Supreme Court, U.S.
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No. 94-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

F. SCHUMACHER & CO.,
Petitioner,

v.

ALVORD-POLK, INC., *et al.*

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

JERROLD J. GANZFRIED
Counsel of Record
MARGARET M. ZWISLER
JILL A. TUENNERMAN
HOWREY & SIMON
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

Counsel for Petitioner
F. Schumacher & Co.

182

QUESTION PRESENTED

The Third Circuit's decision in this case presents a fundamental issue under Section 1 of the Sherman Act concerning the standards for proving a vertical antitrust conspiracy based on circumstantial evidence:

> Whether evidence from which a jury could infer that a manufacturer's publicly stated reason for a vertical restraint was pretextual is sufficient to permit a jury also to infer that the manufacturer conspired with its complaining dealers to adopt the restraint?

The Third Circuit's resolution of this issue is in accord with decisions of the Ninth and Eleventh Circuits and in direct conflict with decisions of the First, Second, Fourth, Seventh and Eighth Circuits.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, the respondents include: American Blind Factory, Inc.; Delta Paint and Wallpaper Supply Co., Inc.; Fairman Wallpaper and Paint Company; Frank R. Yocum t/a Frank R. Yocum & Sons Wallpaper Co.; Harry's Wallpaper, Inc.; Lancaster Carpet Mart, Inc.; Marvin Kolsky t/a Headquarters Windows & Walls; Silver Wallpaper & Paint Co., Inc.; Yankee Wallcoverings, Inc.; and The National Decorating Products Association, Inc.

Pursuant to Supreme Court Rule 29.1, petitioner declares that it has no parent companies and no subsidiaries except those that are wholly owned.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTE INVOLVED 2

INTRODUCTION AND STATEMENT OF THE CASE 2

Factual background 3

Proceedings in the district court 5

Proceedings in the court of appeals 6

REASONS FOR GRANTING THE PETITION 9

1. Circuit Conflict 9

2. The Decision Below Directly Contravenes Supreme Court Precedent 12

3. Further Attributes of this Case Favor Certiorari 14

4. Practical Consequences Favor Certiorari 15

CONCLUSION 16

TABLE OF AUTHORITIES

CASES

Arnold Pontiac-GMC, Inc. v. General Motors Corp.,
786 F.2d 564 (3d Cir. 1986) 12

Big Apple BMW, Inc. v. BMW of North America, Inc.,
974 F.2d 1358 (3d Cir. 1992), *cert. denied*,
113 S. Ct. 1262 (U.S. 1993) 12

Boczar v. Manatee Hosps. & Health Sys.,
993 F.2d 1514 (11th Cir. 1993) 10

Bolt v. Halifax Hosp. Medical Ctr.,
891 F.2d 810 (11th Cir.), *cert. denied*
495 U.S. 924 (1990) 10

Bruce Drug, Inc. v. Hollister, Inc.,
688 F.2d 853 (1st Cir. 1982) 10, 11

Continental T.V., Inc. v. GTE Sylvania,
433 U.S. 36 (1977) 13

Copperweld Corp. v. Independence Tube Corp.,
467 U.S. 752 (1984) 11

De Long Equipment Co. v. Washington Mills Abrasive Co., 887 F.2d 1499 (11th Cir. 1989), *cert. denied*
494 U.S. 1081 (1990) 10

De Long Equipment Co. v. Washington Mills Electro Minerals Corp., 990 F.2d 1186 (11th Cir.),
cert. denied, 114 S. Ct. 604 (1993) 10

Dimidowich v. Bell & Howell,
803 F.2d 1473 (9th Cir. 1986) 10

Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.,
637 F.2d 105 (3d Cir. 1980), *cert. denied*,
451 US. 911 (1981) 13

Garment Dist. Inc. v. Belk Store Services, Inc.,
799 F.2d 905 (4th Cir. 1986), *cert. denied*,
486 U.S. 1005 (1988) 10

H.L. Hayden Co. v. Siemens Medical Systems, Inc.,
879 F.2d 1005 (2d Cir. 1989) 10, 11

H.L. Moore Drug Exchange v. Eli Lilly & Co.,
662 F.2d 935 (2d Cir. 1981), *cert. denied*,
459 U.S. 880 (1982) 10, 11

Lamb's Patio Theatre, Inc. v. Universal Film Exchanges, Inc., 582 F.2d 1068 (7th Cir. 1978) 10

Lovett v. General Motors Corp.,
998 F.2d 575 (8th Cir. 1993), *cert. denied*,
114 S. Ct. 1058 (1994) 10, 11, 12

Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986) 5, 9, 11, 14

Monsanto Co. v. Spray-Rite Serv. Corp.,
465 U.S. 752 (1984) ..... *passim*

United States v. Colgate & Co., 250 U.S. 300 (1919) 13

United States v. Parke, Davis & Co.,
362 U.S. 29 (1960) 13

Venture Technology, Inc. v. National Fuel Gas Co.,
685 F.2d 41 (2d Cir.) *cert. denied* 459 U.S.
1007 (1982) 10, 11

STATUTES

15 U.S.C. § 1 ..... 2, 5

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 6

28 U.S.C. § 1331 5

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PETITION FOR A WRIT OF CERTIORARI

F. Schumacher & Co. ("Schumacher"), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on panel rehearing (App., *infra*, A1-A52) is reported at 37 F.3d 996. The initial panel opinion of the court of appeals (App., *infra*, A55-A111) is reported at 1993-2 Trade Cas. (CCH) ¶ 70322. The opinion of the district court (App., *infra*, A112-A157) is reported at 1992-1 Trade Cas. (CCH) ¶ 69837.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1994. App., *infra*, A53-A54. The timely petition for rehearing was denied on November 15, 1994. *Id.* at A158-

A159. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

INTRODUCTION AND STATEMENT OF THE CASE

This case involves an important and frequently recurring question under Section 1 of the Sherman Act: the nature of circumstantial proof that is sufficient to support an inference of antitrust conspiracy between a manufacturer and its dealers. In the decade that has elapsed since this Court's decision in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), the courts of appeals have divided in their application of Section 1 to claims of manufacturer/dealer conspiracies. The split of authority centers on precisely the issue presented in this case, *viz.*, whether the existence of a conspiracy may be inferred from circumstantial evidence that the stated reason for a manufacturer's distribution policy is allegedly pretextual. Eight courts of appeals have addressed this question, reaching widely disparate results. Review by this Court is therefore needed to restore nationwide uniformity on a question of great practical consequence to all manufacturers that maintain distribution systems designed to maximize sales.

This case provides an ideal vehicle for this Court's consideration because it is undisputed that respondents[1] are

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[1] Only the group of dealers who were plaintiffs below will be referred to as "respondents." For purposes of clarity, the term "respondents" will

"free-riders" and that Schumacher's conduct was fully consistent with lawful, unilateral activity. Accordingly, the decision below turns entirely on the legal question whether evidence of pretext permits an inference of conspiracy.

Factual background. For more than 80 years, Schumacher has been in the business of designing and selling home furnishing products, including wallcoverings sold through its FSC division. Wallcovering consumers must view product samples before making their selections. App., *infra*, A9; CA App. 1236-37. To facilitate the selection process, conventional wallcovering dealers provide customers with comfortable showrooms, wallcovering sample books and knowledgeable salespersons. App., *infra*, A9; CA App. 1236-37, 1249-51, 1555-61. Schumacher has always encouraged its dealers to make substantial investments in sample books, showrooms and staff because market research established that this is the most effective way to promote its products. App., *infra*, A9, A31; CA App. 183, 1341-43, 1520. Retailers willingly made the necessary investments to provide these services because doing so increased their wallcoverings sales. CA App. 517, 520, 526, 1355, 1360.

In the past ten years, changes in the marketplace have undermined the conventional retailer's ability to obtain a return on its investment in point-of-sale and marketing services. A new breed of retailer -- the "800 number" dealer -- uses toll-free numbers to accept orders from consumers nationwide who have "availed themselves of the sample books, displays and assistance offered by conventional retailers." App., *infra*, A9; CA App. 1192-93. Respondents are 800 number dealers who capture sales they have not generated, feeding off the investments of full-service dealers. App., *infra*, A3, A9; CA App. 1192-94, 1279-81, 1288-94, 1367-68 1372-74, 1594. In short, as the court of appeals stated, it is

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not include the National Decorating Products Association, a defendant below, and nominally a respondent in this Court.

undisputed that respondents are free-riders. App., *infra*, A9 n.4, A29, A31.

Schumacher accurately perceived that the emergence of the 800 number free-riders posed a serious threat to its distribution system. CA App. 1238-40, 1340-47. Conventional retailers -- those who pay for the facilities, sample books and salespersons necessary to educate consumers about Schumacher's products and who provide post-sale customer service -- became increasingly unwilling to invest in point-of-sale consumer information and assistance. To maintain its competitive position by ensuring that retailers had sufficient incentive to invest in consumer services, in 1988 Schumacher reacted to the free-riders by announcing a surcharge on drop shipments of wallcoverings.[2] App., *infra*, A14; CA App. 298-99, 1207-08, 1238-40, 1306, 1340-43.

The surcharge policy proved unsuccessful in combating the free-rider problem. CA App. 1512-15, 1307-08. Conventional retailers continued to lose substantial sales to 800 number dealers and to reduce their investments in point-of-sale service. App., *infra*, A15; CA App. 1512-15, 1307-08. Schumacher's sales suffered. CA App. 307. In response, Schumacher unilaterally implemented a revised marketing and advertising policy in 1990 that, among other things, prohibited dealers from selling outside their trading areas ("local trading area policy"). App., *infra*, A16; CA App. 1201-04, 1215, 1218-19, 1222-23, 1238-40, 1249-50, 1340-43, 1520-22, 1550-52. Schumacher believed that, without action against the 800 number dealers, it "would continue to have resistance to purchasing sample books. . ." App., *infra*, A16; CA App. 691. Schumacher's local trading area policy had the desired impact: it reduced free-riding and increased Schumacher's sales. App., *infra*, A16; CA App. 319-21, 982-

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[2] Drop shipments are shipments arranged by 800 number dealers directly from the manufacturer to the purchaser's home. App., *infra*, A9.

84, 1017-19, 1021, 1023-25, 1307, 1371-73, 1662-65, 1770-71, 1831-32, 1836-37.

Proceedings in the district court. In June 1990, a group of ten 800 number dealers filed suit in the United States District Court for the Eastern District of Pennsylvania, alleging that Schumacher's distribution policies violated Section 1 of the Sherman Act, 15 U.S.C. § 1 (1988).[3] Count II of respondents' complaint, which gives rise to the issue presented in this petition, alleged that Schumacher, responding to pressure exerted by retail wallcovering dealers acting through their trade association, the National Decorating Products Association ("NDPA"), conspired with conventional dealers to drive 800 number dealers from the market. After extensive discovery, respondents were bereft of any direct evidence of this alleged conspiracy, and relied solely on circumstantial evidence to establish the concerted action required by § 1.

The district court granted Schumacher's motion for summary judgment (App., *infra*, A112-A157), relying on the standard this Court enunciated in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986), namely, that "[c]onduct which is as consistent with permissible activity as with an illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." App., *infra*, A118. With respect to Count II, the district court adhered to this Court's holding in *Monsanto*, 465 U.S. at 763-64, and precluded inferences that "could deter or penalize perfectly legitimate conduct." App., *infra*, A126. On the record before it, the district court held that plaintiffs had not presented evidence that "tends to exclude that [Schumacher] was acting independently when it developed its marketing and drop-shipment policies." *Id.* at A129.

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[3] District court jurisdiction rested on 28 U.S.C. § 1331. The complaint also alleged a variety of federal and state law claims against the defendants. Those other claims are not at issue in this petition.

Proceedings in the court of appeals. Initially, a divided panel of the Third Circuit affirmed the district court's grant of summary judgment on Count II.[4] App., *infra*, A55-A111. The majority opinion, authored by Judge Lewis, held that the record in this case could not support an inference of a vertical conspiracy between Schumacher and its dealers. The majority applied the rule of *Monsanto* and *Matsushita*, that "evidence of conduct which is 'as consistent with permissible competition as with illegal conspiracy' without more, does not support an inference of conspiracy . . . because mistaken inferences in such a context 'are especially costly[;] they chill the very conduct the antitrust laws are designed to protect.'" App., *infra*, A61 (citations omitted).

In assessing Count II, the court observed that respondents' "allegations flow directly from evidence of conventional retailers complaining to FSC and other manufacturers about [respondents'] 'free-riding.' This type of evidence is as consistent with procompetitive activity as with allegedly illegal activity." *Id.* at A81. The court explained that respondents conceded that they are free-riders and that "[i]t is also undisputed that [petitioner] has for years sold sample books and promotional materials and has encouraged its dealers to invest in those and other overhead costs in order to provide better service to their customers." *Id.* at A83. Against this backdrop, the court continued, "[respondents'] cannot, and do not, argue that [petitioner] imposed the two policies at issue for any reason other than it simply believed its products were best sold through conventional retailers rather than 800-number dealers." *Id.* The majority therefore held that Schumacher's actions "were entirely consistent with its previously held view of its own self-interest." *Id.*

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4 The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

The court also addressed respondents' contention that an inference of concerted action with conventional dealers could be drawn if Schumacher had advanced pretextual reasons for its actions. *Id.* at A85-A88. After reviewing the alleged "pretext," the majority held that respondents' "have simply failed to present evidence tending to exclude the possibility of independent action, as they must to survive summary judgment under *Monsanto.*" *Id.* at A88.

Respondents filed a petition for rehearing that challenged, *inter alia,* the affirmance of summary judgment on Count II. The panel granted rehearing and issued another split decision. App., *infra,* A1-A52. In a 180-degree turnabout, the new majority opinion, again written by Judge Lewis, reversed the district court's grant of summary judgment on Count II. Reviewing precisely the same evidence discussed in its initial opinion, the court reiterated that undisputed evidence permitted a jury to find that Schumacher's actions "were entirely consistent with its previously held view of its own self-interest and do not tend to demonstrate that it acted in conjunction with anyone in implementing its policies." *Id.* at A31. Nonetheless, the court rejected its earlier holding based on reconsideration of respondents' contention that Schumacher asserted "pretextual reasons for its actions." *Id.* at A31-A32. The standard for decision by the new majority was:

> If [petitioner] in fact advanced reasons for its actions which were pretextual, this would tend to support an inference that it acted as part of a conspiracy with conventional retailers.

Id. at A32. The court then turned to the two alleged examples of "pretext." First, respondents sought to draw an inference of conspiracy from "inconsistencies in and contrasts between [Schumacher's] internal and the public explanations of the drop shipment policy." *Id.* at A33.

Comparing the press release announcing the surcharge with a preliminary draft of the announcement, the court concluded that "a jury might view [petitioner's] apparent desire to use more genteel language when explaining its actions to the public as implying a sinister motive." *Id.*

Second, respondents contended that "at one time [petitioner] also stated that the surcharge was intended in part to recoup increased costs associated with drop shipments" but did not "use mathematical calculations to arrive at its surcharge figure." *Id.* at A33. Although it acknowledged that this "does not indicate that [petitioner] was not pursuing its self interests," the court held that "it is not an implausible conclusion that [petitioner] may have imposed the surcharge without first undertaking mathematical calculations because it had agreed with others to impose the surcharge whether it made economic sense or not." *Id.* at A33-A34.

In the court's view, the record contained "some evidence from which a rational jury could infer that [Schumacher] advanced pretextual reasons for its policies" and, therefore, a jury might "in turn infer that FSC had acted in concert with NDPA in deciding to implement policies designed to injure 800-number dealers . . . ." *Id.* at A34.

Judge Stapleton dissented from the disposition on Count II. He explained that liability under Section 1 does not turn on whether defendant had "'a sinister motive,'" but on whether it acted in combination with others. App., *infra*, A50. He also concluded that where the circumstantial evidence of "pretext" was equally compatible with both unilateral and concerted conduct, the majority decision could not be reconciled with the holding in *Monsanto*. *Id.* at A49-A51.

REASONS FOR GRANTING THE PETITION

The decision below conflicts with decisions of five other courts of appeals on the important, recurring question whether ambiguous circumstantial evidence of a manufacturer's allegedly "pretextual" justification for a distribution policy is sufficient, standing alone, to support an inference of concerted action under Section 1 of the Sherman Act. In *Monsanto*, 465 U.S. at 763-64, this Court recognized the importance of free, open communication between a manufacturer and its dealers and, therefore, held that evidence of conduct that is as consistent with permissible competition as it is with illegal conspiracy will not, without more, support an inference of conspiracy under Section 1. Antitrust plaintiffs must present evidence that tends to exclude the possibility that the defendant was acting independently. *Monsanto*, 465 U.S. at 764; *Matsushita*, 475 U.S. at 588.

The decision below turned entirely on the legal issue whether evidence of "pretext," without more, satisfies the requirements of *Monsanto* and *Matsushita*. This is a question on which the court of appeals are deeply and inalterably divided. What could better illustrate the uncertainty that exists in the lower courts than the experience of the Third Circuit panel that looked twice at the same record and reached diametrically opposed results?

Guidance from this Court is plainly needed to ensure nationwide uniformity on this important issue of antitrust law, just as it was when certiorari was granted in *Monsanto* to resolve a similar conflict. Moreover, the absence of factual disputes on the critical issues in this case offers an ideal record for this Court's consideration.

1. *Circuit Conflict*. In the decade since this Court decided *Monsanto*, the lower courts have had numerous opportunities to delineate types of circumstantial evidence that tend to exclude independent action and thereby permit

a Section 1 conspiracy to be inferred. One type of circumstantial evidence has been especially vexing to the federal appellate courts: evidence of allegedly pretextual reasons for a distribution policy. The Third Circuit's holding that evidence of alleged pretext was sufficient to exclude the possibility of independent action conflicts with decisions by the First, Second, Fourth, Seventh, and Eighth Circuits. These courts have all held that evidence of pretext alone will not support an inference of antitrust conspiracy. *Bruce Drug, Inc. v. Hollister, Inc.*, 688 F.2d 853 (1st Cir. 1982); *H.L. Hayden Co. v. Siemens Medical Systems, Inc.*, 879 F.2d 1005 (2d Cir. 1989); *Venture Technology, Inc. v. National Fuel Gas Co.*, 685 F.2d 41 (2d Cir.), *cert. denied*, 459 U.S. 1007 (1982); *H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 941 (2d Cir. 1981), *cert. denied*, 459 U.S. 880 (1982); *Garment Dist. Inc. v. Belk Store Services, Inc.*, 799 F.2d 905 (4th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988); *Lamb's Patio Theatre, Inc. v. Universal Film Exchanges, Inc.*, 582 F.2d 1068 (7th Cir. 1978); *Lovett v. General Motors Corp.*, 998 F.2d 575 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1058 (1994).

Squarely conflicting with these decisions, the Ninth and Eleventh Circuits join the Third Circuit in holding that evidence of pretext is sufficient. *Boczar v. Manatee Hosps. & Health Sys.*, 993 F.2d 1514 (11th Cir. 1993); *Bolt v. Halifax Hosp. Medical Ctr.*, 891 F.2d 810 (11th Cir.), *cert. denied*, 495 U.S. 924 (1990); *De Long Equipment Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499 (11th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990); *Dimidowich v. Bell & Howell*, 803 F.2d 1473 (9th Cir. 1986).[5] *See also, De Long Equipment Co. v. Washington*

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[5] The antitrust claim in *Dimidowich* was brought under a provision of California's Cartwright Act that is patterned after § 1 of the Sherman Act. 803 F.2d at 1476. In assessing evidence of conspiracy, the Ninth Circuit applied the federal law standard of *Monsanto* and *Matsushita* requiring evidence which "'tends to exclude the possibility that the alleged conspirators acted independently.'" *Id.* at 1479. Applying the same standard applicable here, the Ninth Circuit held circumstantial evidence of pretext could permit an inference of conspiracy. *Id.* at 1480.

Mills Electro Minerals Corp., 990 F.2d 1186, 1196 (11th Cir.), *cert. denied*, 114 S. Ct. 604 (1993).

This conflict is rooted in the most fundamental aspect of Section 1, the proscription of concerted -- but not unilateral -- action. *Monsanto*, 465 U.S. at 761; *Matsushita*, 475 U.S. at 588; *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984). In contrast to the decision below, the more discerning decisions of other courts of appeals recognize that evidence of a pretextual reason for defendant's actions does not tend to exclude the possibility of independent action. As the Second Circuit has explained, the fact that a defendant may have had other, unstated, reasons for terminating a distributor or refusing to deal with a particular customer, "makes it **neither more nor less probable** that [the defendant] acted in concert with others rather than unilaterally." *H.L. Moore Drug Exchange*, 662 F.2d at 943 (emphasis added); *Venture Technology, Inc.*, 685 F.2d at 47 ("the most a jury could permissibly infer from such evidence (evidence of pretext) is that [defendant] had some reason other than [those it offered] for its actions."); *H.L. Hayden Co.*, 879 F.2d at 1016.[6]

The First Circuit recognizes that pretextual behavior is equally compatible with independent action and conspiracy alike. While a manufacturer "acting independently" might give "false or inaccurate reason for its action, whether because of a desire to avoid controversy or some other consideration," such behavior would "not violate any legal obligation to the customer, absent proof of a conspiracy or breach of contract." *Bruce Drug, Inc.*, 688 F.2d at 857 (quoting *H.L. Moore Drug Exchange v. Eli Lilly & Co.*).

The strong parallel between the evidence of pretext in this case and in a recent decision by the Eighth Circuit serves to bring the conflict into sharp focus. In *Lovett v.*

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[6] In his dissent below, Judge Stapleton emphasized the same flaw in the majority decision. App., *infra*, A51.

General Motors Corp., 998 F.2d 575 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1058 (1994), a discount automobile dealer alleged that General Motors conspired with full-service dealers to reduce plaintiff's allotment of Buicks. Although full service dealers had complained about plaintiff's free-riding on their investment in showrooms and point-of-sale services, GM told the plaintiff that the reason for the reduction in cars was a shortage of supply. The Eighth Circuit held that defendant was entitled to judgment as a matter of law because this evidence did not tend to exclude the possibility of independent action, as required by *Monsanto*. Even if GM was less than candid in explaining the reasons for its actions, that would not permit an inference that it acted in concert or as part of a conspiracy. *Id.* at 580.

In short, the conflict is extremely pervasive and encompasses a majority of the courts of appeals. The conflict is also well-entrenched. The decision below is the latest in a string of cases in which the Third Circuit has held that circumstantial evidence of pretext will support an inference of antitrust conspiracy. *See Big Apple BMW Inc. v. BMW of North America, Inc.*, 974 F.2d 1358 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1262 (1993); *Arnold Pontiac-GMC, Inc. v. General Motors Corp.*, 786 F.2d 564 (3d Cir. 1986). This Court's review is needed to resolve this split of authority and to restore uniform nationwide application of federal antitrust laws on a keystone issue that affects all manufacturers.

2. ***The Decision Below Directly Contravenes Supreme Court Precedent.*** Even if the conflict among the courts of appeals were less pervasive and entrenched, this Court's review would still be warranted. At a fundamental level, the decision below is at war with the statutory requirement of concerted action in Section 1 of the Sherman Act and is contrary to this Court's interpretation of the statute. *Monsanto* emphasized the centrality of the "basic distinction between concerted and independent action . . . ." 465 U.S. at 761. Because "[i]ndependent action is not proscribed," a manufacturer has a "right to deal, or refuse to

deal, with whomever it likes as long as it does so independently." *Id.*, (citing *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) and *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960)).

Faithful adherence to this distinction is especially vital in the manufacturer/dealer context where "[t]he manufacturer often will want to ensure that its distributors earn sufficient profit to pay for programs such as hiring and training additional salesmen or demonstrating the technical features of the product, and will want to see that 'free-riders' do not interfere." *Monsanto*, 465 U.S. at 763 (citing *Continental T.V., Inc. v. GTE Sylvania*, 433 U.S. 36, 55 (1977)). Recognizing the importance of the free flow of information between manufacturer and dealer in learning about and responding to the competitive marketplace, *Monsanto* held that evidence of dealer complaints followed by manufacturer action is inherently ambiguous and cannot support an inference of conspiracy without "something more". *Monsanto*, 465 U.S. at 764. The majority of courts of appeals have correctly perceived that highly ambiguous circumstantial evidence of "pretext" cannot constitute "something more." Indeed, evidence of "pretext" is even less supportive of an inference of concerted action than is the evidence considered in *Monsanto*; dealer complaints necessarily involve some participation by both dealer and manufacturer, while "pretext" does not.

Against this statutory and jurisprudential landscape, it is clear that the decision below "'would both inhibit management's exercise of its independent business judgment and emasculate the terms of the statute.'" *Monsanto*, 465 U.S. at 764 (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111, n.2 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)). The flaw in the evidentiary standard adopted by the Third Circuit is that it poses a "considerable danger" that the doctrines enunciated in *Monsanto*, *Sylvania* and *Colgate* "will be seriously eroded" by permitting an inference of an unlawful agreement from

"highly ambiguous evidence." *Monsanto*, 465 U.S. at 763. For precisely that reason, this Court held in *Monsanto* that the necessary "something more" must be "evidence that tends to exclude the possibility that the manufacturer . . . [was] acting independently." *Id.* at 764. *See Matsushita*, 475 U.S. at 588. Departing from that principle, the Third Circuit held that respondents' case could proceed where "the scenario which is the focus of Count II is as consistent with pro-competitive activity as with allegedly illegal activity" and where "a jury could find that, because [Schumacher] had for years recognized the importance of selling service, its actions were entirely consistent with its previously held view of its own self-interest and do not tend to demonstrate that it acted in conjunction with anyone in implementing its policies." App., *infra*, A29, A31. Unless the decision below is reversed, the danger this Court envisioned -- and sought to prevent -- in *Monsanto* will be realized.

3. ***Further Attributes of this Case Favor Certiorari.*** This case provides an ideal context for this Court's review. First, the case is devoid of factual dispute on any dispositive issue. As the court of appeals recited, it is undisputed that respondents are free-riders, and that the challenged conduct is perfectly consistent with Schumacher's long-standing, unilateral encouragement of dealers to invest in point-of-sale service. App., *infra*, A29, A31.

Second, there is no doubt that the judgment below turns entirely on the legal standard employed by the Third Circuit. The majority held that the conduct challenged in Count II "is as consistent with procompetitive activity as with allegedly illegal activity." App., *infra*, A29.[7] It was solely the evidence from which a jury could infer "pretext" that led the Third Circuit to hold that a jury could also make

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[7] The dissenting judge agreed with the assessment of the evidence, making the panel unanimous. App., *infra*, A47-A49.

the further inference that petitioner "acted in concert" rather than independently. *Id.* at 34.

4. ***Practical Consequences Favor Certiorari.*** This Court's review is also warranted because the existing split in the circuits has disruptive economic and jurisprudential ramifications. Under the rule adopted by the Third, Ninth and Eleventh Circuits, an inference of conspiracy will arise whenever, in the course of announcing or implementing a vertical distribution policy, a company's public statements about the rationale for that policy arguably conflict with, depart from, or use "more genteel language" than preliminary versions drafted by employees with no policymaking or decisionmaking authority. If such highly ambiguous circumstantial evidence could be the fulcrum for antitrust liability, then, as this Court has recognized, manufacturers would be discouraged from considering and adopting creative policies designed to improve their distribution systems and competitive positions. In short, procompetitive conduct would be chilled.

The problem is particularly acute for companies that distribute products nationwide and are now subject to a patchwork quilt of antitrust standards that vary from circuit to circuit. Even if the impact of the decision below were limited to the thousands of businesses headquartered in cities like Los Angeles, Atlanta, San Francisco, Philadelphia and Pittsburgh (all within the Third, Ninth and Eleventh Circuits), the case would still have sufficient importance to merit this Court's review. Unless this Court restores uniformity, commercial enterprises have a strong incentive to adhere to the most restrictive standard and to forgo procompetitive vertical distribution strategies that would benefit consumers.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

JERROLD J. GANZFRIED
Counsel of Record
MARGARET M. ZWISLER
JILL A. TUENNERMAN
HOWREY & SIMON
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

Counsel for Petitioner
F. Schumacher & Co.

January 1995

APPENDICES

Filed October 12, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1762

ALVORD-POLK, INC.; AMERICAN BLIND FACTORY, INC.; DELTA PAINT AND WALLPAPER SUPPLY CO., INC.; FAIRMAN WALLPAPER AND PAINT COMPANY; FRANK R. YOCUM, t/a FRANK R. YOCUM & SONS WALLPAPER CO.; HARRY'S WALLPAPER, INC.; LANCASTER CARPET MARKET, INC.; MARVIN KOLSKY, t/a HEADQUARTERS WINDOWS & WALLS; SILVER WALLPAPER & PAINT CO., INC.; YANKEE WALLCOVERINGS, INC.,

Appellants,

v.

F. SCHUMACHER & CO.; THE NATIONAL DECORATING PRODUCTS ASSOCIATION, INC.

Appellees,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 90-03617)

ARGUED MARCH 17, 1993

OPINION VACATED SEPTEMBER 15, 1993

SUBMITTED PURSUANT TO LAR 34.1(a)

ON PANEL REHEARING OCTOBER 25, 1993*

BEFORE: STAPLETON, ROTH and LEWIS, *Circuit Judges.*

(Filed October 12, 1994)

Steven A. Asher (ARGUED)
Kohn, Nast & Graf
1101 Market Street
24th Floor
Philadelphia, PA 19107

Attorney for Appellants, Alvord-Polk, Inc.; American Blind Factory, Inc.; Delta Paint and Wallpaper Supply Co., Inc.; Frank R. Yocum, t/a Frank R. Yocum & Sons Wallpaper Co.; Harry's Wallpaper, Inc.; Lancaster Carpet Market, Inc.; Marvin Kolsky, t/a Headquarters Windows & Walls; Silver Wallpaper & Paint Co., Inc.; Yankee Wallcoverings, Inc.

Michael S. Lando (ARGUED)
1411 Fifth Avenue
Pittsburgh, PA 15219

Attorney for Appellant, Fairman Wallpaper and Paint Company

Margaret M. Zwisler (ARGUED)
Howrey & Simon
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2402

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* The motion for oral argument on panel rehearing filed by F. Schumacher & Co. is denied.

Attorney for Appellee,
F. Schumacher & Co.

Richard D. Lageson (ARGUED)
Gino F. Battisti
Suelthaus & Kaplan, P.C.
7733 Forsyth Boulevard, 12th Floor
St. Louis, MO 63105

Attorneys for Appellee, The National Decorating Products Association, Inc.

OPINION OF THE COURT

LEWIS, Circuit Judge.

For over a decade, retailers who market wallpaper by providing sample books and showroom displays have feuded with dealers who sell at a discount through toll-free "1-800" telephone numbers. In this case, ten 800-number dealers have accused the retailers' trade association and one of the leading wallpaper manufacturers of violating antitrust laws in an attempt to force them out of business. The district court granted summary judgment to the defendants on these and certain state-law claims. We will reverse the grant of summary judgment as to some federal and state antitrust claims but will affirm as to others and as to the 800-number dealers' tort claims.

I.

Our review of a grant of summary judgment is plenary; we evaluate the evidence using the same standard the district court was to have applied in reaching its decision. *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1362 (3d Cir. 1992); *J.F. Feeser, Inc. v. Serv-A-*

Portion, Inc., 909 F.2d 1524, 1530 (3d Cir. 1990); *Erie Telecommunications, Inc. v. City of Erie*, 853 F.2d 1084, 1093 (3d Cir. 1988). Plaintiffs have alleged three theories of antitrust liability under the Sherman Act, 15 U.S.C. § 1 (the "Act"). A brief review of the Act and its purposes informs our determination of the standard to be applied on summary judgment.

A.

Section 1 of the Sherman Act provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal[.]

15 U.S.C. § 1. The very essence of a section 1 claim, of course, is the existence of an agreement. Indeed, section 1 liability is predicated upon some form of concerted action.[1] *Fisher v. Berkeley*, 475 U.S. 260, 266 (1986); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-69 (1984); *United States v. Colgate & Co.*, 250 U.S. 300 (1919); *Big Apple BMW*, 974 F.2d at 1364. *See also Weiss v. York Hospital*, 745 F.2d 786, 812 (3d Cir. 1984) (section 1 claim requires proof of three elements, the first of which is "a contract, combination or conspiracy"); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 110 (3d Cir. 1980) ("[u]nilateral action, no matter what its motivation, cannot violate [section] 1"). A "'unity of purpose or a common design and understanding or a meeting of minds in an unlawful arrangement[,]'" must exist to trigger section 1 liability. *Copperweld*, 467 U.S. at 771, *quoting American Tobacco Co. v. United States*, 328 U.S. 781,

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1 The term "concerted action" is often used as shorthand for any form of activity meeting the section 1 "contract, combination or conspiracy" requirement. *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 445-46 (3d Cir. 1977).

810 (1946). *See also Fisher*, 475 U.S. at 267; *Sweeney*, 637 F.2d at 111.

The requirement is an important one, for it emphasizes the distinction between section 1 liability, which is imposed for concerted action in restraint of trade, and liability imposed under section 2 of the Sherman Act for monopolization. *See Copperweld*, 467 U.S. at 767. Activity which is alleged to have been in violation of section 1 may be subject to a *per se* standard and engender liability without inquiry into the harm it has actually caused. *See Copperweld*, 467 U.S. at 768. *See generally Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988). Alternatively, section 1 liability might be imposed for concerted action which violates the "rule of reason" standard without proof that it threatened monopolization. *Copperweld*, 467 U.S. at 768.

Congress treated concerted action more strictly than unilateral behavior because,

> Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly.

Id. at 768-69. For this reason, when we examine an alleged violation of section 1 of the Sherman Act, we look for an

agreement that "brings together economic power that was previously pursuing divergent goals." *Id.* at 769. A lack of such divergent goals precludes officers of a single company from conspiring. Neither internally coordinated conduct of a corporation and its unincorporated division, nor activity undertaken jointly by a parent corporation and its wholly owned subsidiary, can form the bases of section 1 violations. *Id.* at 769-71.

An agreement need not be explicit to result in section 1 liability, *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 59-60 (1911), *quoted in Copperweld*, 467 U.S. at 785 (Stevens, J., dissenting), and may instead be inferred from circumstantial evidence. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540-41 (1954); *Sweeney*, 673 F.2d at 111; *Milgram v. Loew's, Inc.*, 192 F.2d 579, 583 (3d Cir. 1951). Therefore, direct evidence of concerted action is not required.

In this case, the parties contest the propriety of summary judgment on the issue of concerted action in each of three different alleged fact patterns. Before addressing each fact pattern, we turn to a review of the summary judgment standard applicable to antitrust cases.

B.

A district court may enter summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The substantive law determines which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

A party moving for summary judgment need not produce evidence to disprove its opponent's claim, *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), but it does bear the

burden of demonstrating the absence of any genuine issues of material fact. *Big Apple* BMW, 974 F.2d at 1362. As in this case, when the nonmoving party will bear the burden of proof at trial, the moving party may meet its burden by showing that the nonmoving party has failed to produce evidence sufficient to establish the existence of an element essential to its case. *Celotex*, 477 U.S. at 322.

In reviewing the evidence, facts and inferences must be viewed in the light most favorable to the party opposing summary judgment. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). When the moving party has pointed to material facts tending to show there is no genuine issue for trial, however, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 586-87.

This traditional summary judgment standard applies with equal force in antitrust cases, *Eastman Kodak Co. v. Image Technical Services, Inc.*, 119 L.Ed.2d 265, 285 (1992); *Big Apple BMW*, 974 F.2d at 1362-63; however, the meaning we ascribe to circumstantial evidence will vary depending upon the challenged conduct.

For example, evidence of conduct which is "as consistent with permissible competition as with illegal conspiracy," without more, does not support an inference of conspiracy. *Matsushita*, 475 U.S. at 597 n.21, *citing Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763-64 (1984); *Big Apple BMW*, 974 F.2d at 1363. *See generally Fineman v. Armstrong World Industries, Inc.*, 980 F.2d 171, 186-87 (3d Cir. 1992). This is because mistaken inferences in such a context "are especially costly[;] they chill the very conduct the antitrust laws are designed to protect." *Matsushita*, 475 U.S. at 594; *Monsanto*, 465 U.S. at 763-64. In such cases, the Supreme Court has required plaintiffs to submit "evidence

tending to exclude the possibility" of independent action, i.e., "direct or circumstantial evidence that reasonably tends to prove that [the alleged conspirators] 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Monsanto*, 465 U.S. at 764, *quoting Sweeney*, 637 F.2d at 111.

Conversely, if the alleged conduct is "facially anticompetitive and exactly the harm the antitrust laws aim to prevent," no special care need be taken in assigning inferences to circumstantial evidence. *Eastman Kodak*, 119 L.Ed.2d at 291; *Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d 1335, 1339 (3d Cir. 1987) (*Monsanto* and *Matsushita* do not apply when challenged action is overtly anticompetitive); *Tunis Brothers Co., Inc. v. Ford Motor Co., Inc.*, 823 F.2d 49, 50 (3d Cir. 1987) (implying that *Matsushita* requires evidence tending to exclude the possibility of independent action only when the challenged conduct is as consistent with permissible competition as with illegal conspiracy). *See also In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F.2d 432, 438-39 (9th Cir. 1990) ("the key to proper interpretation of *Matsushita* lies in the danger of permitting inferences from certain types of ambiguous evidence").[2]

II.

With these standards in mind, we will review the evidence, granting reasonable inferences to the plaintiffs.[3]

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[2] Similarly, the analyses set forth in *Monsanto* and *Matsushita* do not apply when a plaintiff has offered direct evidence of concerted action. *Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d 1335, 1338 (3d Cir. 1987). *See also In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F.2d 432, 441 (9th Cir. 1990).

[3] Our review does not include consideration of evidence which was the subject of the three pending motions to supplement the record. Nor will we consider citations to evidence in F. Schumacher & Co.'s brief which was not of record before the district court.

Persons interested in decorating or redecorating their homes or offices typically view samples of wallpaper before purchasing. Recognizing this, retailers traditionally have made available to consumers the wallpaper sample books they purchase from manufacturers. They have also provided consumers with information through the use of promotional materials and showroom displays. The purchase of sample books, establishment of a showroom and hiring of knowledgeable sales personnel are costly endeavors and, as one might expect, these costs are reflected in higher prices to consumers. Manufacturers have encouraged retailers to incur these costs, however, because of a prevailing notion that their products sell better when marketed thus.

In recent years, a new breed of retailer has emerged. Some companies now accept orders from consumers all over the United States who call toll-free telephone numbers to order wallpaper after having availed themselves of the sample books, displays and assistance offered by conventional retailers. Today, purchasers may visit a conventional retailer's showroom, peruse the sample books, note the brands and product numbers of the patterns they like, and then go home and order wallpaper at a discount from an 800-number dealer. This informed decision has, of course, been funded in part by retailers who will realize no return on their investment. The 800-number dealer will arrange a "drop shipment" directly from the manufacturer to the purchasers' homes.[4]

Both conventional retailers and 800-number dealers are members of the National Decorating Products

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[4] In the nomenclature of the marketplace, these 800-number dealers are "free-riders," who reduce or eliminate service to create price competition but who benefit from services such as wallpaper sample books, salesperson advice and showroom displays paid for and provided by other, full-service retailers. *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 55 (1977); *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1376-77 (3d Cir. 1992).

Association (the "NDPA"), a trade association comprised of independent retailers who sell a variety of decorating products. The NDPA has about 3,300 members who operate approximately 8,500 retail locations. Its policy is established and its business conducted by an 18-member board of directors. It sponsors a number of trade shows and educational programs for its members each year. It also publishes a monthly industry news journal titled *Decorating Retailer*, and it formerly published a similar newsletter called *Wallcovering Industry News*.

A.

In the late 1970's and early 1980's conventional retailers in the NDPA threatened to cease purchasing products from manufacturers who continued to do business with the 800-number dealers, whom they referred to as "pirates." The NDPA itself actively campaigned against 800-number dealers by lobbying manufacturers to recognize the advantages of conventional retailing and by encouraging them to "level the playing field" between 800-number dealers and conventional retailers.

For example, Robert Petit, NDPA's executive vice president and chief executive officer, spoke to manufacturers, including Michael Landau, president of F. Schumacher & Co. ("FSC") on this subject. Appendix ("App.") at 190-97, 202. In February, 1983, Petit sent a letter on NDPA letterhead urging retailers to request from manufacturers sample books that did not reveal retail prices. Depriving consumers of this information, Petit argued, would make it more difficult for them to avail themselves of an 800-number dealer's discount. App. at 523. The NDPA also marketed a "sales piracy kit" for conventional retailers to use in disguising or concealing pattern numbers and price information on sample books so that consumers could not so easily acquire the information and then order elsewhere. App. at 271-73, 407.

In 1985, the Federal Trade Commission ("FTC") issued a complaint against NDPA because of these activities. In 1986, the parties entered into a consent decree which provided in part:

> NDPA ... shall cease and desist from:
>
> A. Conduct having the purpose or effect of:
>
> * * *
>
> Expressly or impliedly advocating, suggesting, advising, or recommending that any of NDPA's . . . members refuse to deal with any seller of wallcoverings on account of, or that any of NDPA's . . . members engage in any other act to affect, or to attempt to affect, the prices, terms or conditions of sale, or distribution methods or choice of customers or any seller of wallcoverings.

App. at 412. The consent decree also provided:

> IT IS FURTHER ORDERED that this Order shall not be construed to prevent NDPA . . . from publishing written materials or sponsoring seminars, or otherwise providing information or its members' views on topics including but not limited to cost accounting principles, and suggested prices and product identification numbers in wallcovering sample books to other sellers of wallcoverings, provided, however, that the information or views are not presented in a manner constituting a violation of any provision contained in Part II of this Order.

Id.[5]

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[5] We may, of course, consider evidence of activity necessitating the entry of the consent decree, as well as the terms of the consent decree itself, as part of the overall picture, or potential evidence of a pattern of

In the aftermath of this settlement, as required by the consent decree, NDPA circulated a summary of the consent order in which it informed members that NDPA, as a group of competitors, was "already considered to be an 'agreement.'" App. at 430. The NDPA guidelines for conducting meetings, drafted shortly before entry of the consent decree, also acknowledge that "a trade association is, by definition, a combination of competitors." App. at 740. The guidelines further provide that before a chapter officer delivers a speech or makes a presentation at a meeting, he or she should state that the views expressed are his or her own and not those of the NDPA or any chapter. App. at 743.

Since the entry of the consent decree, NDPA has modified its lobbying efforts to some extent, but it has not ceased them. The following passage from Petit's deposition testimony illustrates his view of the effect of the consent decree on NDPA's lobbying activities:

> We changed some of the things we were doing. One of the things that the [FTC] objected to us doing was, for example, having a sales piracy kit. Their feeling on that was that – which we didn't agree with at all [–] that we were projecting a single way for the dealers to take action, and that they felt that this was bad. There was no problem with the FTC of enumerating numerous things that might be done, but not to specialize in one particular thing. So, therefore, we did drop the sales piracy kit.
>
> * * *
>
> We took extra care in everything we did to make sure we lived up to that FTC agreement.

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conduct. *See Big Apple BMW*, 974 F.2d at 1361; *cf. Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

App. at 199. Some NDPA members apparently believe NDPA has substantially altered its activities; one poll revealed that members have resigned because the NDPA is "not doing anything in regard to the sales piracy issue." App. at 200. Petit, however, has continued to impart to manufacturers, including Landau, his view of the advantages of conventional retailing over other methods of marketing wallcovering, such as 800-number sales. App. at 198.

B.

The sentiment against 800-number dealers continued to escalate even after the consent decree was entered. *Decorating Retailer* published several letters from NDPA members, including some retailers who were former or current NDPA officers, urging action against the 800-number dealers. Its editor, John Rogers, often solicited comment for the letters column by sending a variety of articles from a forthcoming issue to a number of people in industry. In each issue of *Decorating Retailer*, a standard statement appeared in the letters column apprising the reader that: "The editor reserves the right to edit to fit space limitations or publishing policies. Opinions expressed are those of the writer and not necessarily those of the editor." *E.g.*, app. at 496.

Decorating Retailer and Wallcovering Industry News also printed several news articles about 800-number dealers, most of which used the term "pirates" among other characterizations to describe them. In May, 1988, one editorial – a *Perspective* column in *Decorating Retailer* – stated that "[t]here are increasing signs that the retailer's voice crying in the wallcovering wilderness is being heard," and cited many developments in the industry, such as "a sudden advent of bar coding kits for retailer protection of sample book pattern numbers," as signs that wallpaper suppliers were responding to retailers' needs. App. at 758.

C.

Undoubtedly, FSC, a leading manufacturer which had always promoted the traditional method of marketing wallcoverings, heard the complaints. In July, 1988, it announced a drop shipment surcharge on wallcovering deliveries directly to consumers, to take effect in September, 1988. App. at 298-99. Under this new policy, FSC would impose a 7 percent surcharge on every order requesting drop shipment. Obviously, this would have the effect of increasing the 800-number dealers' costs while decreasing their ability to compete on the basis of price with conventional retailers.

The minutes from FSC's management committee meeting in April, 1988, state that it considered the policy to be a signal to conventional retailers that FSC was trying to help them. App. at 290. A draft press release, later revised, identified the protection of dealers from piracy as one reason for the surcharge. *Compare* app. at 298-99 *with* app. at 1364-65. Minutes from September, 1989, reveal that the management committee viewed the drop shipment surcharge as "a good first step" against 800-number dealers. App. at 304.

Beyond merely responding to dealer complaints, FSC also claimed that the surcharge was, in part, intended to recoup increased costs of drop shipments. It did not, however, employ any particular formula or calculations to arrive at its surcharge figure or to determine its basis for recoupment. Nor did it consult any source regarding or otherwise study such costs, although the record contains statements by another manufacturer indicating that his costs for drop shipments were no higher than for shipments to stores. App. at 148-49, 622.

Predictably, retailers responded favorably to the imposition of the surcharge. For example, in September,

1988, a *Decorating Retailer* editor's note responding to a letter about 800-number dealers' advertisements stated that "there are signs that telling your troubles to suppliers eventually will be heard and some remedy may result." App. at 485.

Yet the retailers were not entirely satisfied. In January, 1989, at a convention in Halifax, Nova Scotia, Petit revisited the issue of 800-number dealers and the problems they posed for the industry. An August, 1989 memo shows that Petit spoke to at least one manufacturer about "the anger felt by the retailers in lack of support from the wallcovering industry." App. at 185-86. *See also* app. at 190-98, 201-07, 212-29, 404, 416-19, 693-99, 700. During this period, NDPA officer Clyde Morgan also expressed "concern about the 800-number and the effect it was having on me" at a meeting of industry leaders. App. at 183.

The fall 1989 planning session at FSC also reflected continuing concerns about 800-number dealers. In September, 1989, soon after an NDPA meeting, Landau stated at a management committee meeting that the surcharge was a good first step but that other measures were necessary. App. at 304. An October, 1989 memo asked whether "we [should] make another anti-pirate move? If so, what?" App. at 793. In November, 1989, Landau reported to the management committee what he had learned at an NDPA trade show: "retailers squeezed by mass market & 800 #'s." App. at 307. The minutes from that committee's meeting also include the following entry: "800 #s: Meeting with attorneys next week to formulate new strategy." App. at 309.

D.

In January, 1990, FSC announced a local trading policy to be implemented in March, 1990. App. at 694-97. FSC dealers would be prohibited from selling FSC products outside of their "local trading area," thus effectively prohibiting 800-number dealers from selling FSC's products nationwide through their toll-free telephone numbers. Immediately after this policy was announced, Petit circulated a copy of it to the NDPA board of directors, saying, "This is a major step forward in our battle against the 800-number operators." App. at 693. He also sent a letter to Landau on NDPA letterhead stating, "On behalf of the members of our decorating products associations, I want to express our appreciation of your actions." App. at 700.

Five FSC executives testified the purpose of the local trading area policy was to ensure that FSC dealers would realize a return on their investments in sample books and other FSC overhead. App. at 1215, 1218-19, 1222-23, 1238-40, 1249-50, 1340-43, 1520-22, 1550-52. FSC's vice president of sales testified that if FSC had not taken action against the 800-number dealers, it "would continue to have resistance to purchasing sample books with the piracy issue." App. at 691. Indeed, there were several references in planning meetings to safeguarding against free riders and supporting conventional retailers.

Shortly thereafter, according to *Decorating Retailer* and *Wallcovering Industry News* articles, NDPA president John Wells spoke at a trade show in Anaheim, California. The articles describe Wells as urging that "[i]nsisting on supplier support rather than coding books is the answer to piracy problems besetting wallcovering retailers." App. at 440. At the same show Petit, according to one of the articles, applauded manufacturers' efforts to fight 800-number dealers. *Id.* In accordance with NDPA guidelines, Wells specifically stated that his views were his own as an

independent retailer, but the articles refer both to him and to Petit in their NDPA capacities.[6]

In May, 1990, Rogers wrote a *Perspective* column in which he discussed the retailers' opposition to 800-number dealers, reviewed some of the methods retailers had adopted to guard against 800-number dealers' taking their business, and stated, "ultimately, the answer for the individual dealer is that given by Wells: 'I will support those who support me.'" App. at 167. Rogers testified that while the *Perspective* column does not represent the policy of the NDPA, to his knowledge there has not been an occasion when a comment published in it has contravened NDPA's policies.

Both before and after it instituted the policies in question, FSC received letters from retailers urging it to take action against the 800-number dealers. Meanwhile, during this period the FTC repeatedly responded to inquiries from plaintiffs with the assurance that, in its view, NDPA was in compliance with the consent decree entered into in 1986.

E.

Anti-800 number dealer sentiment was not confined to retailers' ranks; manufacturers were also discussing 800-number dealers among themselves. Between 1988 and 1990, wallpaper manufacturers discussed 800-number dealers at meetings of the Wallcovering Manufacturers Association

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6 FSC and NDPA argue that these articles constitute inadmissible hearsay. Plaintiffs respond that the articles are admissible as statements of NDPA, having been published in its own publications. *See* Fed. R. Evid. 801(d)(2) (statements are not hearsay if they are offered against a party and are statements of which the party has "manifested his adoption or belief in its truth"). We agree: an employee of NDPA had to have written these articles, which were adopted by NDPA when it published them in *Decorating Retailer* and *Wallcovering Industry News*. Wells' statements as reflected in the articles are, therefore, admissible.

("WMA"), an organization in which Landau served as a member of the board of directors.

In April, 1988, for example, Landau reported to the FSC management committee that there had been "extensive discussion pirate situation" at the WMA meeting in Hilton Head. App. at 292. Manufacturers also discussed barcoding, in the context of either "pirate-proofing" sample books or standardizing labels and shipping containers. FSC discussed with other manufacturers steps they were taking to combat 800-number dealers, such as engaging in cooperative advertising, imposing state sales taxes and imposing local trading policies.

800-number dealers were also discussed at conventions sponsored by a chain of wallcovering stores called Wallpaper-To-Go. App. at 313, 315. FSC officials and other wallcovering manufacturers deny that they agreed with other manufacturers to take action against the 800-number dealers, however. *See* FSC's brief at 42.

Other manufacturers reacted against the 800-number dealers in much the same fashion as FSC did. In April, 1988, the owner of one company wrote an open letter to manufacturers about 800-number dealers. In it, he suggested that a task force be formed to establish an "effective, standard and universal method of '[p]irate-[p]roofing' sample books." App. at 884. At least one manufacturer took a step in that direction and coded its sample books so that style and price information could not easily be discerned. App. at 139-41. Another imposed a local trading policy, app. at 130-38, 151, and another tried, but discontinued, a cooperative advertising program with conventional retailers. App. at 127-28. By August, 1989, two more manufacturers had imposed a drop shipment surcharge. App. at 160, 789.

III.

In May, 1990, plaintiffs filed suit against NDPA and FSC. Their amended complaint, filed in January, 1991, contained twelve counts, the first four of which provide the central focus for this appeal. In Count I, they alleged that "[t]he individual retail wallcovering dealers, acting through the NDPA" violated section 1 of the Sherman Act by entering into a horizontal conspiracy to eliminate the competition posed by 800-number dealers. In Count II, the plaintiffs alleged that in response to the pressure exerted by the NDPA, FSC joined NDPA in a vertical conspiracy similarly designed to thwart competition. In Counts III and IV, the plaintiffs alleged that FSC entered into a conspiracy with other, unnamed, wallcovering manufacturers aimed at eliminating 800-number dealers. Specifically, plaintiffs challenged FSC's imposition of the drop shipment surcharge and its adoption of local trading policy as being directed at them.[7]

Plaintiffs also alleged a claim under section 2(d) of the Clayton Act, 15 U.S.C. § 13(d); state-law antitrust and restraint of trade violations; tortious interference with contracts and prospective contractual relations; fraud and misrepresentation; defamation and commercial disparagement and breach of contract. In turn, FSC asserted various counterclaims against the 800-number dealers.

The district court granted defendants' motions for summary judgment on Counts I through IV and granted both plaintiffs and defendants summary judgment on various other claims and counterclaims. Thereafter, the parties settled those claims which had not been disposed of,

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[7] Their amended complaint indicates that plaintiffs originally were concerned about two additional FSC policies: FSC's failure to discuss cooperative advertising possibilities with 800-number dealers though it did so with conventional retailers, and FSC's charging state sales tax on drop shipments. These policies, however, are not subjects of this appeal.

and plaintiffs filed this appeal challenging the district court's decision on Counts I through IV, the state-law antitrust claims, the tortious interference claim and the defamation claim against NDPA.

The district court had jurisdiction over this case pursuant to 28 U.S.C. § 1331, and we exercise jurisdiction pursuant to 28 U.S. § 1291.[8] In our analysis of each of the plaintiffs' Sherman Act claims, which allege three distinct antitrust theories of liability, we proceed from the premise that "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

IV.

At Count I, in which plaintiffs named only NDPA as a defendant, they alleged that conventional retailers, acting

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[8] NDPA and FSC argue that we lack jurisdiction over this appeal because the district court failed to enter a judgment on a separate document in accordance with Rule 58 of the Federal Rules of Civil Procedure and had not yet awarded costs in accordance with Rule 54(d) of the Federal Rules of Civil Procedure.

In *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978) (per curiam), however, the Supreme Court recognized that the rules of civil procedure requiring entry of judgment on a separate document should be interpreted in a common-sense fashion. "If, by error, a separate judgment is not filed before a party appeals, nothing but delay would flow from requiring the court of appeals to dismiss the appeal." *Mallis*, 435 U.S. at 385-86. *See also International Brotherhood of Teamsters v. Western Pennsylvania Motor Carriers Assoc.*, 660 F.2d 76, 80 (3d Cir. 1981). The district court's failure to enter judgment in accordance with the dictates of Rule 58 appears to stem from oversight. No other plausible suggestion has been advanced. Thus, we reject this jurisdictional argument.

As to costs, we note that the parties' stipulation of settlement, which disposed of those counts as to which the district court had not granted summary judgment and which was entered as an order by the district court, provided that each party was to bear its own costs, thus implicitly if not actually resolving any Rule 54(d) issue.

through the NDPA, conspired to pressure manufacturers to eliminate them from the marketplace. The district court examined the record for evidence of "officially sanctioned NDPA activity," found none, and ruled that plaintiffs could not meet the "concerted action" requirement because "[t]he NDPA can only act pursuant to a resolution from its board and no such resolution has been identified." App. at 37. We will reverse.

A.

It is both uncontested and uncontestable that NDPA is an association of competing wallpaper dealers. As such, when NDPA takes action it has engaged in concerted action so as to trigger potential section 1 liability. *Weiss*, 745 F.2d at 816 (hospital executive committee's actions are concerted action within the meaning on section 1). "[A]ntitrust policy requires the courts to seek the economic substance of an arrangement, not merely its form." *Weiss*, 745 F.2d at 815. The actions of a group of competitors taken in one name present the same potential evils as do the actions of a group of competitors who have not created a formal organization within which to operate. *See id.* at 816 ("[w]here such associations exist, their actions are subject to scrutiny under section 1 . . . in order to insure that their members do not abuse otherwise legitimate organizations to secure an unfair advantage over their competitors"). *See also Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); *Associated Press v. United States*, 326 U.S. 1 (1945).

We agree with NDPA's contention, however, that NDPA can only be held liable for concerted action if it acted as an entity. *See Nanavati v. Burdette Tomlin Memorial Hospital*, 857 F.2d 96, 117-18 (3d Cir. 1988) (*Weiss* holds that when a group of competitors "acts as a body, it constitutes a 'combination'"). In *Nanavati*, we held that although the actions of a hospital executive committee might constitute concerted action, the committee does not engage in

concerted action when it does not "act[] as an entity in furtherance of the conspiracy." *Id.* at 119. As we explained there:

> Our conclusion in *Weiss* was premised on the concept that where individual actors take actions as a group, they are a combination for the purposes of those actions. Where no group is taken, no such combination can exist. In short, we did not hold in *Weiss* that because the actions of the medical staff constitute the actions of a combination, even where there is no allegation that the staff acted as a group, the 'contract, combination or conspiracy' requirement has been met. Such a group is a combination as a matter of law only for the actions it takes as a group.

Id.

In *Nanavati*, the plaintiff did not maintain that the executive committee took any action as a group. *Id.* Instead, he pointed to the actions of medical staff members who were not on the executive committee as the basis for his claim. He argued that the record contained evidence of a boycott against him by members of the medical staff, so the jury had not erred in finding that the executive committee had participated in the boycott. Our search for evidence that members of the executive committee had acted in furtherance of the boycott yielded none; thus, we affirmed the district court's grant of judgment n.o.v. to the executive committee.

Nanavati teaches that concerted action does not exist every time a trade association member speaks or acts. Instead, in assessing whether a trade association (or any other group of competitors) has taken concerted action, a court must examine all the facts and circumstances to determine whether the action taken was the result of some

agreement, tacit or otherwise,[9] among members of the association. *See generally Nanavati*, 857 F.2d at 119-20.

Judicial scrutiny of alleged concerted action, undertaken to determine whether it was the result of an agreement, is an intricate endeavor. In the straightforward case, such as when a stock exchange requires disconnection of a nonmember's private telephone wire, or a hospital executive committee votes to deny staff privileges to a member, the action is obviously a result of an agreement which is stamped with the imprimatur of the association by a vote or passage of a resolution. *See, e.g., Silver*, 373 U.S. at 347; *Weiss*, 745 F.2d at 816. We can hardly say, however, that this case falls within that genre.

Here, plaintiffs rely on *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982), to argue that NDPA took concerted action when its officers spoke out in protest against the 800-number dealers' business methods and when NDPA publications included letters complaining about 800-number dealers. In *Hydrolevel*, the Supreme Court, relying on general principles of agency law, determined that the American Society of Mechanical Engineers ("ASME") could be held liable for the actions of its officers and agents taken with apparent authority. Writing for the majority, Justice Blackmun held that imposing liability based upon apparent authority comported with the intent of the antitrust laws because ASME possessed great power and the codes and standards it issued influenced policies and affected entities' abilities to do business. *Hydrolevel*, 456 U.S. at 570. "When it cloaks its subcommittee officials with the authority of its reputation,

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[9] It would be incorrect to require an official board resolution, or other officially sanctioned activity, to impose liability on NDPA. Recognizing that perpetrators of antitrust violations are often sophisticated businessmen, courts regularly permit agreements to be shown by circumstantial evidence. *See Big Apple BMW*, 974 F.2d at 1364; *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540-41 (1954).

ASME permits those agents to affect the destinies of businesses and thus gives them the power to frustrate competition in the marketplace." *Id.* at 570-71. Imposing antitrust liability on the association for the actions of its agents would encourage ASME to police its ranks and prevent the use of associations by one or more competitors to injure another. *See generally id.* at 571-73. *See also* M. Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 Geo. L. J. 395, 417-18 (1986).[10]

In deciding *Hydrolevel*, the Court rejected ASME's argument that it should not be held liable unless its agents had acted with an intent to benefit it. This argument was irrelevant, the Court held, in part because "[w]hether they intend to benefit ASME or not, ASME's agents exercise economic power because they act with the force of the Society's reputation behind them." *Hydrolevel*, 456 U.S. at 574. The Court viewed the imposition of liability regardless of the agents' intent as more consistent with the purposes of antitrust law, since this would encourage ASME to police its agents so as to prevent the anticompetitive effects of their using its name and power even in individual efforts at restraining trade. *Id.*

The issue presented here, however, is markedly different. In *Hydrolevel*, the plaintiff had named three defendants in its conspiracy claim. Although it is difficult to discern the exact contours of the alleged conspiracy from the

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[10] Judge Boudin notes that the Supreme Court in *Hydrolevel* viewed ASME as an "extra-governmental agency" regulating its own industry. *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 570 (1982). *See M. Boudin, Antitrust Doctrine and the Sway of Metaphor*, 75 Geo L. J. 395, 417 (1986). Indeed, *Hydrolevel* and many other trade association cases have focused on this role and on associations' standard-setting or industry-regulating activities. *See e.g. Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985); *Moore v. Boating Industry Assoc.*, 819 F.2d 693 (7th Cir. 1987). *See generally* ABA Antitrust Section, *Antitrust Law Developments* 86-91 (3d ed. 1992). Notably, the case before us does not involve standard-setting or industry-regulating activity on NDPA's part.

Hydrolevel opinion, it is quite clear that the plaintiff there was not seeking to hold ASME liable for concerted action solely on the basis of actions taken by one official with apparent authority. The conspiracy alleged apparently was between the chairman of an ASME standards committee and the plaintiff's primary competitor; the question before the Court was whether ASME could be held liable for its agent's anticompetitive activity in participating in the conspiracy even though no one else at ASME had authorized the violation. Because a conspiracy was alleged to have taken place between the ASME official and another conspirator, the Court did not address the question of whether an agent with apparent authority can cause a trade association to be held liable for violating the antitrust laws by taking action on behalf of the association which would have amounted to such a violation if the association itself, as a combination of competitors, had undertaken it.

We believe that the *Hydrolevel* rule that an association's economic power may justify its being held liable for the actions of its agents cannot be extended to defeat the "concerted action" requirement of section 1. Imposing liability on an association, as we did in *Weiss*, does not abolish or diminish the first element of section 1 liability; it merely recognizes that a group of competitors with a unity of purpose are engaged in concerted action, whether or not they act under one name. As we explained in *Nanavati*, in the absence of a co-conspirator, an association's actions satisfy the concerted action requirement only when taken in a group capacity. The potential for antitrust liability arising from the concerted action of a group such as a trade association, as that liability may be established by the apparent authority of an agent to speak on behalf of and bind that association, has not yet been fully explored in a trade restraint case.[11] In *Hydrolevel*, for example, the Court

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[11] There is, however, authority for the proposition that a trade association, in and of itself, is a unit of joint action sufficient to constitute a section 1 combination. *See* G.D. Webster, The Law of Associations § 9a.01[1], 9A3-4 (1991) ("There is no question that an association is a

described the concept of apparent authority as one which results in liability on a principal's part for an agent's torts. *Hydrolevel*, 456 U.S. at 565-66. Thus, if an agent commits fraud, his or her principal is liable if he or she acted with apparent authority to act on behalf of the principal. *Id.* at 566. Similarly, if an agent acting with apparent authority makes misrepresentations that cause pecuniary loss to a third party or is "guilty of defamation," the principal is liable. *Id. See also id.* at 568; *see generally* Restatement (Second) of Agency §§ 215 *et seq.* (a principal is liable for the "torts of its servants" and for its "servants' tortious conduct"). Applying that general principle to the antitrust area leads us to conclude that a principal will be liable for an antitrust violation if an agent acting with apparent authority violates the antitrust laws, as one did in *Hydrolevel* by conspiring with another person. *See Hydrolevel*, 456 U.S. at 572 (speaking in terms of finding "ASME . . . civilly liable *for the antitrust violations* of its agents acting with apparent authority" (emphasis added)).

We are dealing here, however, with a trade association which is charged with violating the antitrust laws by constituting a horizontal conspiracy to eliminate the 800-number dealers. Clearly, an association, as a combination of its members, can violate the antitrust laws through such a conspiracy. This was the nature of the claim which prompted the FTC to initiate its complaint against the NDPA in 1985. The singular characteristic of plaintiffs' allegations here is that the association is now charged with acting through agents whom it has imbued with apparent

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'combination' within the meaning of Section 1 of the Sherman Act. Although a conspiracy requires more than one person, an association, by its very nature a group, satisfies the requirement of joint action. Thus, any association activity which restrains interstate commerce can be violative of Section 1 even if no one acts in concert with the association."); Stephanie W. Kanwit, *FTC Enforcement Efforts Involving Trade and Professional Associations*, 46 Antitrust L.J. 640, 640 (1977) ("Because trade associations are, by definition, organizations of competitors, they automatically satisfy the combination requirements of § 1 of the Sherman Act.")

authority. It is uncontested that the NDPA is highly sophisticated and possesses significant market power; it is unrealistic to think that such a sophisticated trade association, wary of the antitrust laws, would ingenuously act as an association in endorsing the type of activity forbidden by the consent decree.

In considering the antitrust implications of this situation, though, our first concern must be whether plaintiffs' allegations demonstrate an antitrust violation. Specifically, we must determine whether statements by NDPA officers demonstrate that NDPA recommended that its members refuse to deal with any seller of wallcoverings on account of the prices or distribution methods of that seller. We must also determine whether the evidence could show that the NDPA officers' statements were made with the apparent authority of the membership of the NDPA for those officers to act as the NDPA's agents. This method of analysis is consistent with *Hydrolevel*, which instructs that a court must find an antitrust violation before deciding whether to hold an association liable for that violation by virtue of the perpetrator's apparent authority.[12]

B.

Having focused our inquiry not just upon whether Petit or other NDPA agents might have acted with apparent authority but also upon whether their actions could constitute an antitrust violation in the absence of that authority, we believe that a rational jury could find for the plaintiffs if the evidence presented to us is proven at trial. As noted previously, Petit has acknowledged that since the

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[12] We do not, however, require that members of NDPA actually ratify an agent's actions before NDPA may be held liable for them. Such a rule not only would be unrealistic, *see supra* note 9, but it also would contravene the Court's admonition that agents of trade associations acting with apparent authority exercise the associations' economic power regardless of whether they are acting to benefit of the associations. *Hydrolevel*, 456 U.S. at 573-74.

entry of the FTC consent decree he has continued to urge manufacturers to take steps to hinder 800-number dealers in the conduct of their business. App. at 199, 407. He described himself as conveying "the concerns of NDPA," app. at 191, and he stated that he views it as part of his job to convey those concerns. App. at 192. Additionally, once FSC announced its local trading policy, Petit circulated a copy of it to the NDPA board of directors along with a memorandum which could be read as triumphant. App. at 693. From this, a rational juror could infer that Petit viewed himself as being authorized by the NDPA to make the statements he made.

Moreover, the record contains evidence from which a rational juror could also infer that Petit's actions represented concerted action. That is, a jury could find that, while representing NDPA, Petit went beyond merely voicing complaints to manufacturers to actually coercing (or attempting to coerce) them into cooperating in eliminating 800-number dealers. There is some evidence that Petit emphasized to manufacturers with whom he met "the anger felt by the retailers in [the] lack of support from the wallcovering industry." App. at 185. See also app. at 190-98, 218-29. Such evidence, when viewed against the existing backdrop of urgings from NDPA officers and editors that retailers should support only those manufacturers who supported them, could imply a threat of a retailers' boycott if manufacturers did not take steps to help eliminate 800-number dealers from the marketplace.

In sum, nothing in either the antitrust laws or the FTC consent decree prohibits NDPA from voicing complaints. Granting all reasonable inferences to the plaintiffs, however, a rational jury could find that NDPA did more than serve as a conduit for members' complaints in this case. It could, for example, find that NDPA, acting through its officers, threatened a retailers' boycott of manufacturers and thus could hold NDPA liable for a

section 1 violation. For these reasons, we will reverse the district court's grant of summary judgment at Count I.

V.

At Count II, plaintiffs alleged that FSC responded to pressure from the NDPA by conspiring with it to eliminate 800-number wallpaper dealers from the marketplace. Their allegations flow directly from evidence of FSC's taking actions to eliminate free riders from the marketplace in response to conventional retailers' complaints (and, possibly, threats of boycott). There is no dispute that plaintiffs are free riders, and there is no question as to the legitimacy of a manufacturer's desire to rid the marketplace of free riders. *See Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 55 (1977); *cf. Big Apple BMW*, 974 F.2d at 1377-78. Therefore, the scenario which is the focus of Count II is as consistent with procompetitive activity as with allegedly illegal activity. *Monsanto*, 465 U.S. at 763.

In *Monsanto*, a case which also involved an alleged conspiracy to terminate a dealership relationship because of other dealers' complaints, the Supreme Court noted:

> Permitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about 'in response to complaints, could deter or penalize perfectly legitimate conduct. [C]omplaints about price cutters 'are natural — and from the manufacturer's perspective, unavoidable — reactions by distributors to the activities of their rivals.' Such complaints . . . 'arise in the normal course of business and do not indicate illegal concerted action.' . . . Moreover, distributors are an important source of information for manufacturers. In order to assure an efficient distribution system, manufacturers and distributors constantly must

> coordinate their activities to assure that their product will reach the consumer persuasively and efficiently. To bar a manufacturer from acting solely because the information upon which it acts originated as a price complaint would create an irrational dislocation in the market.

Monsanto, 465 U.S. at 763-64. Thus, we exercise a measure of caution when drawing inferences from such facts; "a fine line demarcates concerted action that violates antitrust law from legitimate business practices." *Big Apple BMW*, 974 F.2d at 1363, *citing Monsanto*, 465 U.S. at 762-64. *See also Matsushita*, 475 U.S. at 597 n.21.[13]

In *Big Apple BMW*, plaintiffs alleged that BMW of North America, Inc. ("BMW") had refused to grant automobile dealerships to them because other dealers had complained about plaintiffs' high-volume, deep-discount business methods. BMW asserted a variety of legitimate business reasons for its actions, including a concern about plaintiffs being "free-rider" dealers. Plaintiffs, however, presented evidence that they would not have posed the "free-rider" problem BMW feared, *see Big Apple BMW*, 974 F.2d at 1377, and that a person with the same advertising tactics as theirs (high-volume, deep-discount "sellathons") had been granted a BMW franchise. *Id.* at 1378. They also presented evidence tending to discredit the other reasons BMW proffered to support its refusal to grant them a franchise. *Id.* at 1377-80.

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[13] In *Matsushita*, the Supreme Court, in the context of an alleged horizontal price-fixing conspiracy, ruled that the case should not proceed to trial because the petitioners lacked a rational motive to conspire in the manner alleged. It also noted, however, that its ruling was not meant to "imply that, if petitioners had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy. Our decision in *Monsanto* . . . establishes that conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy." *Matsushita*, 475 U.S. at 597 n.21.

We reversed the district court's grant of summary judgment because plaintiffs had advanced evidence tending to exclude the possibility of BMW's having acted independently from the complaining dealers. They had "countered each alleged reason with evidence that both discredits BMW NA's witnesses and provides independent support for the [plaintiffs'] claim that BMW NA and its dealers acted in concert to repel" plaintiffs' competition. *Id.* at 1380.

Similarly, in *Arnold Pontiac-GMC, Inc. v. General Motors Corp.*, 786 F.2d 564 (3d Cir. 1986), we reversed a grant of summary judgment because defendant General Motors Corporation ("GMC") first favorably viewed plaintiff's franchise application, then heard its dealers' disapproval and threatened non-cooperation, and then denied the application. GMC had not expressed concern about the plaintiff's franchise application until it heard its dealers' complaints. We held that "we must infer that [the dealers'] conduct contributed to GMC's decision not to award [the plaintiff] the Buick franchise." *Arnold Pontiac*, 786 F.2d at 573.

In marked contrast to *Big Apple BMW* and *Arnold Pontiac*, here the 800-number dealers concede that they are free riders. It is also undisputed that FSC has for years sold sample books and promotional materials and has encouraged its dealers to invest in these and other overhead costs in order to provide better service to their customers. A jury could find that, because FSC had for years recognized the importance of selling service, its actions aimed at 800-number dealers were entirely consistent with its previously held view of its own self-interest and do not tend to demonstrate that it acted in conjunction with anyone in implementing its policies.

On the other hand, however, the record also contains evidence that may indicate concerted action between FSC and NDPA. Specifically, plaintiffs highlight two examples

of what they claim to be FSC's assertion of pretextual reasons for its actions. If FSC in fact advanced reasons for its actions which were pretextual, this would tend to support an inference that it acted as part of a conspiracy with conventional retailers. *See Big Apple BMW*, 974 F.2d at 1374-80.

First, plaintiffs point to evidence in FSC's management committee minutes which contrast the "objective" of its drop shipment surcharge ("To make statement to industry that we are trying to help them") with the "rationale" for this surcharge ("To protect legitimate customers, [t]o increase margins in this area"). App. at 290. They also point to a parallel distinction between FSC's original and published press releases announcing the surcharge. The original press release stated:

> In direct response to retailer requests, we at F. Schumacher & Company are proud to announce that we will assertively support our dealers in their local trading areas and protect them from sales piracy by adding a seven percent surcharge onto all drop shipments . . . While bar coding is a breakthrough for the industry in terms of product identification we feel that it alone is not an entirely effective deterrent against sales piracy . . . . Our approach attacks the problem at its root and makes the accounts who drop ship feel the effects, rather than leaving the responsibility of policing to the retailers.

App. at 298-99. The final press release stated that the policy was not designed to combat "piracy" but rather to

> help insure that our consumers receive the best possible service and that our wallcovering brands are supported in the most effective and appropriate manner at retail . . . This policy seeks to encourage all dealers to concentrate their selling

> efforts exclusively within their own trading areas where they can provide service directly to the consumers to whom they sell the product.

App. at 486.

Plaintiffs argue that these inconsistencies in and contrasts between the internal and the public explanations of the drop shipment policy reveal that FSC was attempting to disguise the true reason for its actions. We agree; while the two statements and the two press releases could be seen as being in harmony with FSC's explanation that it took the action it did to protect the investments made by traditional retailers, a jury might view FSC's apparent desire to use more genteel language when explaining its actions to the public as implying a sinister motive.

Second, plaintiffs argue that although FSC acknowledges that dealer complaints were part of the reason for its surcharge, at one time it also stated that the surcharge was intended in part to recoup increased costs associated with drop shipments. FSC did not, however, use mathematical calculations to arrive at its surcharge figure; it neither consulted anyone regarding nor studied such costs, and the record contains statements by another manufacturer indicating that his costs for drop shipments were no higher than for shipments to stores. This, plaintiffs argue, underscores the arbitrariness of the surcharge and evinces FSC's true, sinister motive.

A lack of market research, while perhaps adding luster to plaintiffs' contention that the surcharge was arbitrarily determined, does not necessarily invite an inference that FSC's statement was an attempt to conceal a conspiracy. It is true that the seven percent figure did not reflect an analysis of FSC's costs; however, this does not indicate that FSC was not pursuing its self interests in imposing it. Nevertheless, viewing this evidence in conjunction with the press releases and the retailer pressure

on FSC, it is not an implausible conclusion that FSC may have imposed the surcharge without first undertaking mathematical calculations because it had agreed with others to impose the surcharge whether it made economic sense or not.

Accordingly, because there is some evidence from which a rational jury could infer that FSC advanced pretextual reasons for its policies, and might in turn infer that FSC had acted in concert with NDPA in deciding to implement policies designed to injure 800-number dealers, we will reverse the district court's grant of summary judgment at Count II.

VI.

At Counts III and IV, plaintiffs allege that FSC conspired with other wallcovering manufacturers to injure the 800-number dealers. We will affirm the district court's grant of summary judgment as to these counts because plaintiffs' evidence tends to show only an opportunity to conspire, not an agreement to do so.

Certainly, direct evidence (or a direct inference) of an agreement between FSC and other manufacturers regarding 800-number dealers could enable plaintiffs to show concerted action. The evidence of an agreement, however, amounts to nothing more than communications on the 800-number subject. Communications alone, although more suspicious among competitors than between a manufacturer and its distributors, do not necessarily result in liability. *Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879, 894 (3d Cir. 1981). As we have observed, it is only when those communications rise to the level of an agreement, tacit or otherwise, that they become an antitrust violation.

Thus, plaintiffs are left to argue that FSC and other manufacturers conspired based upon their parallel conduct. "[P]roof of consciously parallel business behavior is

circumstantial evidence from which an agreement, tacit or express, can be inferred but . . . such evidence, without more, is insufficient unless the circumstances under which it occurred make the inference of rational, independent choice less attractive than that of concerted action." *Bogosian v. United States*, 561 F.2d 434, 446 (3d Cir. 1977). The circumstances necessary to support such an inference are: (a) a showing that the defendants acted contrary to their own economic interests; and (b) satisfactory demonstration of a motivation to enter an agreement. *Id., citing Venzie Corp. v. United States Mineral Products Co., Inc.*, 521 F.2d 1309, 1314 (3d Cir. 1975). *See also Petruzzi's IGA Supermarkets, Inc. v. Darling Delaware Co., Inc.*, 998 F.2d 1224 (3d Cir. 1993); *Schoenkopf v. Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 208 (3d Cir. 1980).

In particular, when evidence shows communications which provided an opportunity for agreement, a plaintiff must still produce evidence permitting an inference that an agreement in fact existed. *Venzie*, 521 F.2d at 1313. The evidence must give rise to more than speculation. *Id.*

In *Venzie*, for example, plaintiffs contended that two defendant corporations had agreed to refuse to sell fireproofing material to them. The record contained evidence that defendants had made numerous telephone calls, at least one of which concerned the plaintiffs, to each other and had met for lunch. We held that it was for the jury to assess the credibility of the defendants' assertions that they had not discussed or agreed upon the alleged refusal to deal, but, even disregarding statements to that effect, all that plaintiffs' evidence proved was an opportunity for an agreement, which would not suffice to support a verdict. Plaintiffs had failed to highlight evidence supporting an inference that an agreement in fact existed and thus could not support a verdict. *Venzie*, 521 F.2d at 1312. *See also Tose*, 648 F.2d at 895.

In contrast, a particularly detailed memorandum of a telephone call can give rise to a reasonable inference of agreement. In *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 254 (2d Cir 1987), for example, the plaintiff survived a summary judgment motion by advancing evidence in the form of detailed memoranda indicating the existence of an agreement.

In this case, it is conceded that manufacturers discussed 800-number dealers, and actions they were taking concerning them, at conventions. The evidence of communications thus falls somewhere between *Venzie*, in which there were no notations of the subject matter of the conversations, and *Apex Oil*, in which the notations implied an agreement. Plaintiffs, however, seek to infer an agreement from those communications despite a lack of independent evidence tending to show an agreement and in the face of uncontradicted testimony that only informational exchanges took place. Without more, they cannot do so. *Cf. Tose*, 648 F.2d at 894 (mere disbelief of contrary testimony does not prove agreement).

We emphasize that unlike actions such as price-cutting, which provide the classic example of conscious parallelism, FSC's action was in its economic interests. It is simple syllogistic reasoning that if FSC was aware that most of its dealers were conventional retailers, and believed that its products sold better in the conventional setting, it would conclude that it was in its economic interests to keep the conventional retailers satisfied. That FSC may have foregone some short-term opportunity for sales to 800-number dealers does not suffice to show it acted contrary to its self-interests when its actions clearly would benefit it economically in the long term. *Tose*, 648 F.2d at 895; *see* P. Areeda, *Antitrust Law* § 1415e (1986). FSC's listening to retailers' complaints in no way implies that there was an agreement among manufacturers to do the same. *See Venzie*, 521 F.2d at 1314 ("[t]he absence of action contrary to one's economic interest renders consciously parallel business

behavior 'meaningless, and in no way indicates agreement,'" *quoting* Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 681 (1962)); *see also Houser v. Fox Theatres Management Corp*, 845 F.2d 1225, 1232-33 (3d Cir. 1988) (requiring both actions contrary to economic interests and motive to conspire).

VII.

Remaining for disposition are the plaintiffs' state-law antitrust and tort claims. To the extent that their state-law antitrust claims mirror their federal antitrust claims, we will dispose of those claims in like manner. We will affirm the district court's disposition of the state-law tort claims.

A.

In Count VI, plaintiffs alleged that the defendants violated Pennsylvania antitrust law by engaging in the activity alleged as the basis of Counts I through IV. This allegation rises or falls with plaintiffs' federal antitrust claims. *See Collins v. Main Line Board of Realtors*, 304 A.2d 493 (Pa. 1973); *Schwartz v. Laundry and Linen Supply Drivers' Union*, 14 A.2d 438 (Pa. Super. 1940); plaintiffs' brief at 45; FSC's brief at 47-48. Therefore, our decision with respect to Counts I through IV disposes of Count VI as well. Count VI survives to the extent that it is directed toward the theories of liability upon which Counts I and II are based; to the extent it is a counterpart of Counts III and IV, however, we will affirm the district court's grant of summary judgment.

B.

In Count VII, plaintiffs alleged that FSC and NDPA tortiously interfered with their existing and prospective contracts. We have previously noted that the "factual underpinnings" of such intentional interference claims

generally "are intertwined with" the antitrust claims they accompany, *see Big Apple BMW*, 974 F.2d at 1381-82, but that statement does not imply that claims of intentional interference with contractual relations must always survive summary judgment if a plaintiff's antitrust claims survive. It merely implies what to some might be obvious — that antitrust violations or other actions in restraint of trade are examples of improper conduct. We are not bound, therefore, to reversing on the tortious interference claims merely because we are reversing on two of plaintiffs' antitrust claims. Instead, we will affirm the grant of summary judgment to defendants on Count VII because plaintiffs have failed to demonstrate that they would be able to present evidence tending to prove each element of their tortious interference claims at trial.

To establish a claim of tortious interference with existing contracts, plaintiffs must prove that the defendants intentionally and improperly interfered with their performance of contracts with third persons. *Nathanson v. Medical College of Pennsylvania*, 926 F.2d 1368, 1388 (3d Cir. 1991); *Adler, Barish, Daniels, Levin and Creskoff v. Epstein*, 393 A.2d 1175, 1183 (Pa. 1978). To prove their claims of tortious interference with prospective contractual relations, plaintiffs likewise must prove, *inter alia*, the existence of prospective contracts. *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 471 (Pa. 1979). A prospective contract "is something less than a contractual right, something more than a mere hope[ ]" *id.*; it exists if there is a reasonable probability that a contract will arise from the parties' current dealings. *Glenn v. Point Park College*, 272 A.2d 895, 898-99 (Pa. 1971).

Plaintiffs have failed to identify with sufficient precision contracts and prospective contracts which were interfered with by the defendants. They have likewise failed to identify an existing contract which was terminated because of the defendants' actions. Nor have they demonstrated a reasonable probability that they would have entered into prospective contracts with third parties but for

defendants' alleged interference. *See General Sound Telephone Co., Inc. v. AT&T Communications, Inc.*, 654 F. Supp. 1562, 1565-66 (E.D. Pa. 1987). This case differs in this respect from *Big Apple BMW*, in which we reversed a grant of summary judgment on claims of intentional interference with contractual relations solely because their "factual underpinnings" were "intertwined with the antitrust claims" as to which we were reversing a grant of summary judgment. In *Big Apple BMW*, the plaintiffs had specified transactions in which they claimed defendants' actions had deprived them of specific automobile dealership franchises. In contrast, in this case, plaintiffs have failed to advance more than speculation to support their claim of tortious interference; therefore, we will affirm the district court as to this count.

C.

Finally, in Count X, plaintiffs alleged that the NDPA defamed them by publishing articles and editorials referring to 800-number dealers as "pirates." Under Pennsylvania law, a statement is defamatory if it "'tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'" *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 923 (3d Cir. 1990), *quoting Birl v. Philadelphia Electric Co.*, 167 A.2d 472, 475 (Pa. 1960). To prove their claim, plaintiffs must show: (1) the defamatory character of the statements; (2) publication by NDPA; (3) the statements' application to the plaintiffs; (4) an understanding by readers of the statements' defamatory meaning; and (5) an understanding by readers of an intent on the part of NDPA to refer to the plaintiffs. 42 Pa. Cons. Stat. Ann. § 8343(a) (1982); *U.S. Healthcare*, 898 F.2d at 923. The law does not require that a plaintiff be specifically named in an allegedly defamatory statement, for a statement might be defamatory if, by description or circumstances, it

tends to identify the plaintiff as its object. *Redco Corp. v. CBS, Inc.*, 758 F.2d 970, 972 (3d Cir. 1985).

Plaintiffs base their defamation claim upon statements referring to 800-number dealers in general as "pirates." Individual group members may sue based upon statements about a group when the statements were directed toward a "comparatively small class or group all of whose constituent members may be readily identified and the recipients of the [statements] are likely to identify some, if not all, of them as intended objects of the defamation." *Farrell v. Triangle Publications, Inc.*, 159 A.2d 734, 736-37 (Pa. 1960). But no claim arises from a defamatory remark directed toward a group whose membership is so numerous that no individual member can reasonably be deemed its intended object. *Id.* at 736. Similarly, no claim exists if, for any other reason, a reader could not reasonably conclude that the statements at issue referred to the particular person or persons alleging defamation. *Id.* at 737.

Relying upon record evidence indicating that in 1990 there were only 20 to 25 800-number dealers in the industry (app. at 1123-24), plaintiffs argue that they may base their claim on statements directed at 800-number dealers in general. *Cf.* Restatement (Second) of Torts § 564A, comment c. As noted above, however, a group's size is not the sole consideration in determining whether individual members may assert defamation claims based upon statements about the group. A group may be relatively small, but statements which disparage it may not serve as a basis for an individual defamation claim unless a reader could reasonably connect them to the complaining individual.

In *Farrell*, for example, one of 13 township commissioners asserted a defamation claim against a newspaper which had published a story implicating "a number of township commissioners and others" in corrupt activity. *Farrell*, 159 A.2d at 736. The Pennsylvania Supreme Court held that the plaintiff had stated a claim for

defamation. In so holding, however, the court concentrated not on the size of the group discussed but on whether readers "knew that the plaintiff was one of the thirteen commissioners." *Id.* at 738. We similarly do not end our inquiry upon being apprised that there were between 20 and 25 800-number dealers in 1990; we examine whether the plaintiffs were "sufficiently identified as [objects of NDPA's statements] to justifiably warrant a conclusion that [their] individual reputation[s have] been substantially injured." *Id.* at 736.

Here, there is nothing in the record other than the number of 800-dealers which could support a conclusion that any of the plaintiffs' individual reputations were injured by NDPA's statements about 800-number dealers in general. Indeed, the individual identities of this group's members are, by the very nature of their business, less meaningful than the telephone numbers they promote to facilitate discount purchases. This group appears amorphous and ill-defined when compared to the well-defined group of township commissioners at issue in *Farrell*. Plaintiffs have not produced evidence tending to prove that they belong to such an easily identifiable, cohesive group that a reader would ascribe statements referring to 800-number dealers in general as "pirates" to any of them individually. Thus, we will affirm the district court's grant of summary judgment on Count X.

VIII.

For the foregoing reasons, we will reverse the district court's grant of summary judgment as to Counts I and II, as well as the corresponding portion of Count VI, but will affirm its disposition of Counts III, IV, VII and X and the remainder of Count VI.

STAPLETON, J., *concurring in part and dissenting in part*:

I would affirm the district court's summary judgment in favor of the defendants on the vertical conspiracy count and, accordingly, dissent from Section V of the court's opinion. I am also unable to join all of Sections IV-A, VII-A, and VII-B. I do join the remainder of the court's opinion. I comment only on the trade association aspect of the horizontal conspiracy charge and on the vertical conspiracy charge.

I.

Trade associations have been held liable for unreasonably restraining trade in violation of section 1 of the Sherman Act, even when they have not been accused of contracting, combining, or conspiring with other unrelated actors. *See, e.g., National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978). Courts, however, have not articulated how a trade association, by itself, can violate a statute which "does not prohibit unreasonable restraints on trade as such — but only restraints effected by a contract, combination, or conspiracy." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 775 (1984).

A sound theory of trade association liability under section 1 will recognize the anticompetitive potential inherent in a agglomeration of competitors. Indeed, trade associations have fixed prices, *see, e.g., Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), organized group boycotts, *see, e.g., Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941), allocated customers and territories, *see, e.g., United States v. Topco Assoc., Inc.*, 405 U.S. 596 (1972), and suppressed potential competitors, *see, e.g., United States v. Women's Sportswear Mfr. Ass'n*, 336 U.S. 460 (1949). A sound theory of trade association liability, however, also will recognize that some trade association activities are not necessarily inconsistent with the preservation of

competition. These activities include cooperative research, market surveys, development of new uses for products, mutual insurance, publication of trade journals, advertising, and joint representation before legislative and administrative agencies. *See* Julian O. van Kalinowski, *Antitrust Laws and Trade Regulation* § 61.01. Most trade associations are organized for the purpose of pursuing these kinds of activities and most members initially join because of the benefit to be derived therefrom. If such an association thereafter engages in anticompetitive activity, only a limited number of its members may be involved in, or even aware of, the change of course. Finally, a sound theory of trade association liability will conform with the "well-established" rule that "[a] single person or entity acting alone is not subject to the strictures of Section 1." Earl W. Kintner, *Federal Antitrust Law* § 9.7.

The plaintiffs insist that trade association activity is concerted activity for purposes of section 1. Since any activity of an officer of an association engaged in with apparent authority is activity of the association under conventional rules of agency, any such activity, in plaintiffs' view, is thus concerted activity for purposes of section 1. This logic eviscerates the concerted action requirement of section 1.[1]

In my view, the agreement element of a section 1 claim is satisfied if, but only if, it is shown that two or more of the association's members have committed themselves to the anti-competitive activity of the trade association and to the accomplishment of its objectives. Thus, in the absence of a conspiracy between the trade association and a third party,

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[1] For the reasons explained in the court's opinion, the agency principles discussed in *American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982), and the Supreme Court's application of those principles in that case are not pertinent until a violation of section 1 has been established.

the association can be liable only if some of its members are using it to unreasonably restrain trade.

Since a trade association is normally controlled by its members, where an association has engaged in anticompetitive activity, it normally will not be difficult to show the necessary agreement among a group of its members. The focus of the theory on the commitment of its members to anticompetitive activity, however, has important corollary consequences. One is that members of the trade association who neither participate nor knowingly acquiesce in the association's anticompetitive activity, unlike those who do, will not be held liable along with the association. *See, e.g., Kline v. Coldwell, Banker & Co.*, 508 F.2d 226 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Phelps Dodge Refining Corp. v. FTC*, 139 F.2d 393 (2d Cir. 1943); *see generally*, Earl W. Kinter, *Federal Antitrust Law* § 9.16.

Another collateral consequence of this theory of concerted activity is that, in the absence of membership commitment to an activity engaged in by an association officer or a conspiracy between the officer and some other entity, the activity of the officer is not concerted activity. It seems to me that this must be true without regard to whether the officer had apparent authority to act as he did, although evidence supporting the existence of apparent authority may also constitute circumstantial evidence tending to show concerted activity on the part of the members of the association.

As the district court recognized, if NDPA's directors, acting on behalf of the retailers they represent, had passed a resolution instructing its officers to recruit retailers for a boycott of any manufacturer who dealt with 800-number dealers and to threaten manufacturers with such a boycott, and an officer of the association had carried out this directive, the association clearly would have engaged in concerted activity for purposes of section 1. As the district

court emphasized, there is no evidence of such formal corporate action in this record.

The district court erred, however, by not continuing its inquiry beyond this level. If NDPA's directors did not pass such a resolution but, acting on behalf of the retailers they represented, tacitly agreed among themselves to so instruct NDPA's officers, the association would just as surely be engaged in concerted activity when an officer carried out this agreement. In this situation, as in the first, NDPA would have been used by its members, through their representatives on the board, to engage in concerted activity. The same would be true if an officer of the NDPA had initiated this kind of anti-competitive activity without the knowledge or approval of the board and the board, after learning of it, had approved or acquiesced in it. As a matter of antitrust theory, however, I do not think that an activity of an NDPA officer, even if engaged in with apparent authority, can constitute concerted activity in the absence of some basis for inferring member commitment to that activity.

With this theoretical background, I turn to the summary judgment record in this case. Plaintiffs urge that a trier of fact could infer from the present record that officers of NDPA, with the approval of NDPA's board and the retailers they represent, threatened FSC and other manufacturers with a dealer boycott if they did not take measures against the 800-number dealers. I do not understand the defendants to urge at this stage that such an inference would not provide a satisfactory basis for imposing section 1 liability.[2] They do insist, however, that such an inference cannot reasonably be drawn from the current record. While the issue is a close one, I think there is

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[2] I express no opinion on whether the activities the defendants are accused of engaging in constitute an unreasonable restraint of trade within the meaning of Section 1 of the Sherman Act.

enough evidence to make the plaintiffs' inference a permissible one.

Mr. Petit, the CEO of NDPA, candidly acknowledged speaking directly to numerous manufacturers after the consent decree about the concerns of conventional retailers regarding 800-number dealers. Given the past history of the matter and Mr. Petit's view that the scope of FTC's consent decree was of very limited effect, a rational trier of fact could infer that Mr. Petit continued, after the decree, not only to express to manufacturers the concerns of the conventional dealers, but also to call upon them to take specific steps to thwart the 800-number dealers. When he spoke to manufacturers about his matter, he spoke on behalf of the NDPA. As he testified, he spoke about "the concerns of the NDPA." App. 191. Clearly, he viewed himself as authorized by the NDPA to say what he did. As he put it, "That's my job," referring to his campaign among the manufacturers. App. 192.

As the defendants stress, there is no direct evidence of a threat of a boycott by Mr. Petit or anyone else on NDPA's behalf. There is, however, evidence that Mr. Petit emphasized to the manufacturers "the anger felt by the retailers in [the] lack of support from the wallcovering industry," App. 185, and that his demands for action by the manufacturers came against a background of public, oral and written advice from NDPA officers that conventional retailers should deal only with those manufacturers who supported them. When one adds to this evidence the fact that some manufacturers did respond with measures against the 800-number dealers; I believe a trier of fact could conclude that a boycott threat was intended by the NDPA officers and understood by the manufacturers.

Finally, if a trier of fact inferred that NDPA officers implicitly threatened a boycott, it would be permissible for the trier of fact to further infer that the NDPA board members knew of the boycott threat and at least tacitly

approved it. Mr. Petit's triumphant memorandum of January 29, 1990, to the board members is strong circumstantial evidence supporting this view. That memorandum, it will be recalled, declared that FSC's decision not to sell to the "sales pirates" was "a major step forward in *our* battle against the 800-number operators." App. 693 (emphasis added). There is, in addition, evidence that the board regularly discussed this matter and it was receiving intense pressure from NDPA membership to do something about the problem. Thus, like my colleagues, I would reverse the district court's summary judgment in favor of the defendants on the horizontal conspiracy charge.

II.

Turning to the charged vertical conspiracy, I start with the undisputed propositions that (1) potential purchasers of wallcovering normally desire to view samples of the merchandise before making a purchase, (2) as a result, FSC has for years sold sample books and promotional materials and has for years encouraged other investment from its retailers to facilitate customer selection and satisfaction, and (3) the 800-number retailers are free riders as far as that investment is concerned. Since FSC cannot long remain successfully in business if its retailers are unwilling to make the investment necessary to facilitate customer selection and satisfaction, FSC has a legitimate and compelling interest in making sure free riders do not maintain a competitive advantage over retailers who are willing to make that investment. Nothing in this record tends to show that FSC took any action with respect to the plaintiffs other than to serve this interest. In particular, there is no evidence from which a finder of fact could infer a retail price maintenance conspiracy involving FSC. Under the now-familiar teachings of *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), the mere fact that FSC's conventional retailers complained and FSC acted in response

to those complaints does not preclude summary judgment for the defendants.

In *Monsanto*, a manufacturer and some of its distributors allegedly conspired to sanction a discount distributor. The Supreme Court began its analysis by noting that section 1 outlaws only some sanctions against a discount distributor: unilateral conduct is not forbidden and concerted action is *per se* illegal only when it fixes prices. *Id.* at 760-61. The Supreme Court then observed that these distinctions are often difficult to apply in practice because the economic effect of legal and illegal conduct can be similar — indeed, "judged from a distance, the conduct of the parties in the various situations can be indistinguishable." *Id.* at 762. Care, the Supreme Court directed, should be taken in inferring a conspiracy from highly ambiguous evidence, lest perfectly legitimate conduct is deterred or penalized. *Id.* at 763. The Supreme Court went on to hold that a vertical conspiracy cannot be inferred solely from evidence of complaints from distributors to a manufacturer about a discount distributor and a resulting termination of the discount distributor:

> Permitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about "in response to" complaints, could deter or penalize perfectly legitimate conduct. . . . Moreover, distributors are an important source of information for manufacturers. In order to assure an efficient distribution system, manufacturers and distributors constantly must coordinate their activities to assure that their product will reach the consumer persuasively and efficiently. To bar a manufacturer from acting solely because the information upon which it acts originated as a price complaint would create an irrational dislocation in the market. . . .

> Thus, something more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. As Judge Aldisert has written, the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others "had a conscious commitment to a common scheme designed to achieve an unlawful objective."

Id. at 764.

The three pieces of evidence that the plaintiffs in this case have offered to prove a vertical conspiracy fail to meet the standard that the Supreme Court set forth in *Monsanto*. First, the plaintiffs note that the conventional retailers complained to FSC about the 800-number dealers. Complaints like these are precisely what the Supreme Court considered in *Monsanto* and found to be insufficient to prove a vertical conspiracy:

> [C]omplaints about price cutters "are natural — and from the manufacturer's perspective, unavoidable — reactions by distributors to their rivals." Such complaints, particularly where the manufacturer has imposed a costly set of nonprice restrictions, "arise in the normal course of business and do not indicate illegal concerted action."

Id. at 763 (citations omitted).

Second, plaintiffs offer evidence that FSC did not use mathematical calculations from its own cost data to set the drop-shipment surcharge, even though the surcharge was purportedly instituted to equalize the costs of deliveries to the conventional and 800-number retailers. The absence of mathematical calculation supposedly suggests a vertical conspiracy: in the words of this court, "FSC may have

imposed the surcharge without first undertaking mathematical calculations because it had agreed with others to impose the surcharge whether it made economic sense or not."

FSC's determination of the drop-shipment surcharge is not probative of whether FSC acted alone or in conspiracy with the conventional retailers. An arbitrarily chosen surcharge is equally compatible with both unilateral and concerted conduct. Seeking to end destructive free-riding, FSC might have exercised its right under *United States v. Colgate*, 250 U.S. 300 (1919), to unilaterally limit its dealings with 800-number retailers and, toward that end, imposed a substantial surcharge to level the playing field for conventional retailers, or even to cripple the 800-number retailers. While I acknowledge that FSC and the conventional retailers conceivably could have conspired to cripple the 800-number retailers through a substantial surcharge, that concession does not preclude summary judgment for the defendants. Because a surcharge fixed by FSC is equally compatible with both hypotheses, no inference of conspiracy can be drawn: "*Monsanto* . . . establishes that conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 597 n.21 (1986).

Plaintiffs' third piece of evidence of a vertical conspiracy is the differently-phrased explanations FSC offered in internal and external communications for the drop-shipment surcharge. This court observes that "a jury might view FSC's apparent desire to use more genteel language when explaining its actions to the public as implying a sinister motive."

FSC's liability under section 1, however, does not turn on whether FSC had "a sinister motive," but whether it acted alone or in combination with the conventional

retailers. The varying tones in internal and external communications are consistent with both hypotheses — the sanitized language that FSC used to avoid drawing attention to its moves against the 800-number dealers could have been the result of either a unilateral decision to eliminate free-riding or a conspiracy with the conventional dealers against the 800-number retailers. Once more plaintiffs have presented "highly ambiguous evidence," *Monsanto*, 465 U.S. at 763, that does not tend "to exclude the possibility that the manufacturer and nonterminated distributors were acting independently," *id.* at 764.

A misreading of *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1262 (1993), may well be responsible for the court's decision on the vertical conspiracy count. In *Big Apple BMW*, we noted that a manufacturer's "inconsistent reasons" for denying a franchise support an inference of conspiracy with existing franchisees. *Id.* at 1374. The court seizes on this language from *Big Apple BMW* to argue that FSC's drop-shipment surcharge and the varying tones of internal and external communication about the surcharge are inconsistencies which permit an inference of conspiracy. This analogy is flawed.

In *Big Apple BMW*, unsuccessful applicants for an automobile dealership brought a claim under section 1, charging that the manufacturer and existing dealers conspired to deny them the dealership because they would have been price cutters. The plaintiffs identified actions of the defendants which suggested a conspiracy, but the defendants tendered business reasons for each of their actions. We found that summary judgment was inappropriate: even though the defendants had offered justifications for their actions, these justifications were "internally inconsistent and inconsistent with [the manufacturer's] concomitant treatment of [other] dealers." *Id.* at 1374. For example, the manufacturer claimed that it refused to award a franchise to the applicants because they

attempted to bribe one of its employees; evidence showed that the same employee solicited the applicants to buy a franchise only a year after the attempted bribe. *Id.* at 1368. The manufacturer claimed that it refused to award a franchise to the applicants because they would have engaged in price advertising; evidence showed that other dealers engaged in price advertising. *Id.* at 1378. The manufacturer claimed that it refused to award a franchise to the applicants because they would have located their dealership in an "automall" adjacent to other manufacturers' dealerships; evidence showed that the manufacturer tolerated other multi-franchise dealerships. *Id.* at 1380.

In *Big Apple BMW*, if the trier of fact believed the plaintiffs' evidence that tended to show pretext, it would be left with no reason to believe that the manufacturer acted unilaterally to advance its own self interest. This case is fundamentally different. A trier of fact in this case could believe that FSC did not calculate the drop charge from its cost data and could agree with every inference plaintiffs seek to draw from the draft press release and this would still not alter the indisputable fact that FSC had a legitimate and compelling self interest in solving the free rider problem and preserving an effective distribution system.

Finding no evidence in the record that tends to exclude the possibility that FSC acted unilaterally against the 800-number dealers, I would affirm the district court's grant of summary judgment on the vertical conspiracy count.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1762

ALVORD-POLK, INC.: AMERICAN BLIND FACTORY, INC.; DELTA PAINT AND WALLPAPER SUPPLY CO., INC.; FAIRMAN WALLPAPER AND PAINT COMPANY; FRANK R. YOCUM, T/A FRANK R. YOCUM & SONS WALLPAPER CO.; HARRY'S WALLPAPER, INC.; LANCASTER CARPET MARKET, INC.; MARVIN KOLSKY, T/A HEADQUARTERS WINDOWS & WALLS; SILVER WALLPAPER & PAINT CO., INC.; YANKEE WALLCOVERINGS, INC.,

Appellants,

v.

F. SCHUMACHER & CO.; THE NATIONAL DECORATING PRODUCTS ASSOCIATION, INC.

Appellees,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 90-03617)

Present: Stapleton, Roth and Lewis, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on March 17, 1993 and submitted on panel rehearing pursuant to 3rd Cir. LAR 34.1(a) on October 25, 1994.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered May 22, 1992, be, and the same is hereby reversed with respect to the grant of summary judgment as to Counts I and II, as well as the corresponding portion of Count VI. However, the disposition of Counts III, IV, VII and X and the remainder of Count VI is affirmed. The motion for oral argument on panel rehearing which was filed by F. Schumacher & Co. is denied. All of the above in accordance with the opinion of this Court.

ATTEST:

/S/

Chief Deputy Clerk

Dated: October 12, 1994

Certified as a true copy and issued in lieu of a formal issued mandate on November 23, 1994.

Teste: /S/

Clerk of the United States Court of Appeals
for the Third Circuit

Filed August 5, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1762

ALVORD-POLK, INC.: AMERICAN BLIND FACTORY, INC.; DELTA PAINT AND WALLPAPER SUPPLY CO., INC.; FAIRMAN WALLPAPER AND PAINT COMPANY; FRANK R. YOCUM, T/A FRANK R. YOCUM & SONS WALLPAPER CO.; HARRY'S WALLPAPER, INC.; LANCASTER CARPET MARKET, INC.; MARVIN KOLSKY, T/A HEADQUARTERS WINDOWS & WALLS; SILVER WALLPAPER & PAINT CO., INC.; YANKEE WALLCOVERINGS, INC.,

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F. SCHUMACHER & CO.; THE NATIONAL DECORATING PRODUCTS ASSOCIATION, INC.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 90-03617)

ARGUED MARCH 17, 1993

BEFORE: STAPLETON, ROTH AND LEWIS, *CIRCUIT JUDGES*.

(Filed August 5, 1993)

STEVEN A. ASHER, ESQUIRE
(ARGUED)
KOHN, NAST & GRAF
1101 MARKET STREET
24TH FLOOR
PHILADELPHIA, PA 19107
ATTORNEY FOR APPELLANTS, ALVORD-POLK, INC., AMERICAN BLIND FACTORY, INC.; DELTA PAINT AND WALLPAPER SUPPLY CO., INC.; FRANK R. YOCUM, T/A FRANK R. YOCUM & SONS WALLPAPER CO.; HARRY'S WALLPAPER, INC.; LANCASTER CARPET MARKET, INC.; MARVIN KOLSKY, T/A HEADQUARTERS WINDOWS & WALLS; SILVER WALLPAPER & PAINT CO., INC.; YANKEE WALLCOVERINGS, INC.

MICHAEL S. LANDO, ESQUIRE
(ARGUED)
1411 FIFTH AVENUE
PITTSBURGH, PA 15219
ATTORNEY FOR APPELLANT, FAIRMAN WALLPAPER AND PAINT COMPANY

MARGARET M. ZWISLER, ESQUIRE
(ARGUED)
HOWREY & SIMON
1730 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20006-4793
ATTORNEY FOR APPELLEE, F. SCHUMACHER & CO.

RICHARD D. LAGESON, ESQUIRE
(ARGUED)
GINO F. BATTISTI, ESQUIRE
SUELTHAUS & KAPLAN, P.C.

7733 FORSYTH BOULEVARD, 12TH FL.
ST. LOUIS, MO 63105
ATTORNEYS FOR APPELLEE, THE NATIONAL DECORATING PRODUCTS ASSOCIATION, INC.

OPINION OF THE COURT

LEWIS, *Circuit Judge.*

For over a decade, retailers who market wallpaper by providing sample books and showroom displays have feuded with dealers who sell at a discount through toll-free "1-800" telephone numbers. In this case, ten 800-number dealers have accused the retailers' trade association and one of the leading wallpaper manufacturers of violating antitrust laws in an attempt to force them out of business. The district court granted summary judgment to the defendants on these and certain state-law claims. We will affirm.

I.

Our review of a grant of summary judgment is plenary; we evaluate the evidence using the same standard the district court was to have applied in reaching its decision. *Big Apple BMW, Inc. v. BMW of North Carolina, Inc.*, 974 F.2d 1358, 1362 (3d Cir. 1992); *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1530 (3d Cir. 1990); *Erie Telecommunications, Inc. v. City of Erie*, 853 F.2d 1084, 1093 (3d Cir. 1988). Plaintiffs have alleged three theories of antitrust liability under the Sherman Act, 15 U.S.C. § 1 (the "Act"). A brief review of the Act and its purposes informs our determination of the standard to be applied on summary judgment.

A.

Section 1 of the Sherman Act provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal[.]

15 U.S.C. § 1. The very essence of a section 1 claim, of course, is the existence of an agreement. Indeed, section 1 liability is predicated upon some form of concerted action.[1] *Fisher v. Berkeley*, 475 U.S. 260, 266 (1986); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-69 (1984); *United States v. Colgate & Co.*, 250 U.S. 300 (1919); *Big Apple BMW*, 974 F.2d at 1364. *See also Weiss v. York Hospital*, 745 F.2d 786, 812 (3d Cir. 1984) (section 1 claim requires proof of three elements, the first of which is "a contract, combination or conspiracy"); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 110 (3d Cir. 1980) ("[u]nilateral action, no matter what is motivation, cannot violate [section] 1"). A "'unity of purpose or a common design and understanding or a meeting of minds in an unlawful arrangement[,] '" must exist to trigger section 1 liability. *Copperweld*, 467 U.S. at 771, *quoting American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). *See also Fisher*, 475 U.S. at 267; *Sweeney*, 637 F.2d at 111.

The requirement is an important one, for it emphasizes the distinction between section 1 liability, which is imposed for concerted action in restraint of trade, and liability imposed under section 2 of the Sherman Act for monopolization. *See Copperweld*, 467 U.S. at 767. Activity which is alleged to have been in violation of section 1 may be subject to a *per se* standard and engender liability without

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[1] The term "concerted action" is often used as shorthand for any form of activity meeting the section 1 "contract, combination or conspiracy" requirement. *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 445-46 (3d Cir. 1977).

inquiry into the harm it has actually caused. *See Copperweld*, 467 U.S. 768. *See generally Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988). Alternatively, section 1 liability might be imposed for concerted action which violates the "rule of reason" standard without proof that it threatened monopolization. *Copperweld*, 467 U.S. at 768.

Congress treated concerted action more strictly than unilateral behavior because,

> Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly.

Id. at 768-69. For this reason, when we examine an alleged violation of section 1 of the Sherman Act, we look for an agreement that "brings together economic power that was previously pursuing divergent goals." *Id.* at 769. A lack of such divergent goals precludes officers of a single company from conspiring. Neither internally coordinated conduct of a corporation and its unincorporated division, nor activity undertaken jointly by a parent corporation and its wholly owned subsidiary, can form the bases of section 1 violations. *Id.* at 769-71.

An agreement need not be explicit to result in section 1 liability, *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 59-60 (1911), quoted in *Copperweld*, 467 U.S. at 785 (Stevens, J., dissenting), and may instead be inferred from circumstantial evidence. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540-41 (1954); *Sweeney*, 673 F.2d at 111; *Milgram v. Loew's, Inc.*, 192 F.2d 579, 583 (3d Cir. 1951). Therefore, direct evidence of concerted action is not required.

In this case, the parties contest the propriety of summary judgment on the issue of concerted action in each of three different alleged fact patterns. Before addressing each fact pattern, we turn to a review of the summary judgment standard applicable to antitrust cases.

B.

A district court may enter a summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The substantive law determines which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

A party moving for summary judgment need not produce evidence to disprove its opponent's claim, *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), but it does bear the burden of demonstrating the absence of any genuine issues of material fact. *Big Apple BMW*, 974 F.2d at 1362. As in this case, when the nonmoving party will bear the burden of proof at trial, the moving party may meet its burden by showing that the nonmoving party has failed to produce evidence sufficient to establish the existence of an element essential to its case. *Celotex*, 477 U.S. at 322.

In reviewing the evidence, facts and inferences must be viewed in the light most favorable to the party opposing summary judgment. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). When the moving party has pointed to material facts tending to show there is no genuine issue for trial, however, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 586-87.

This traditional summary judgment standard applies with equal force in antitrust cases, *Eastman Kodak Co. v. Image Technical Services, Inc.*, 119 L.E.d.2d 265, 285 (1992); *Big Apple BMW*, 974 F.2d at 1362-63; however, the meaning we ascribe to circumstantial evidence will vary depending upon the challenged conduct.

For example, evidence of conduct which is "as consistent with permissible competition as with illegal conspiracy," without more, does not support an inference of conspiracy. *Matsushita*, 475 U.S. at 597 n.21, *citing Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763-64 (1984); *Big Apple BMW*, 974 F.2d at 1363. *See generally Fineman v. Armstrong World Industries, Inc.*, 980 F.2d 171, 186-87 (3d Cir. 1992). This is because mistaken inferences in such a context "are especially costly[;] they chill the very conduct the antitrust laws are designed to protect." *Matsushita*, 475 U.S. at 594; *Monsanto*, 465 U.S. at 763-64. In such cases, the Supreme Court has required plaintiffs to submit "evidence tending to exclude the possibility" of independent action, i.e., "direct or circumstantial evidence that reasonably tends to prove that [the alleged conspirators] 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Monsanto*, 465 U.S. at 764, *quoting Sweeney*, 637 F.2d at 111.

Conversely, if the alleged conduct is "facially anticompetitive and exactly the harm the antitrust laws aim to prevent," no special care need be taken in assigning inferences to circumstantial evidence. *Eastman Kodak*, 119 L.Ed.2d at 291; *Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d 1335, 1339 (3d Cir. 1987) (*Monsanto* and *Matsushita* do not apply when challenged action is overtly anticompetitive); *Tunis Brothers Co., Inc. v. Ford Motor Co., Inc.*, 823 F.2d 49, 50 (3d Cir. 1987) (implying that *Matsushita* requires evidence tending to exclude the possibility of independent action only when the challenged conduct is as consistent with permissible competition as with illegal conspiracy). *See also In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F.2d 432, 438-39 (9th Cir. 1990) ("the key to proper interpretation of *Matsushita* lies in the danger of permitting inferences from certain types of ambiguous evidence").[2]

II.

With these standards in mind, we will review the evidence, granting reasonable inferences to the plaintiffs.[3]

Persons interested in decorating or redecorating their homes or offices typically view samples of wallpaper before purchasing. Recognizing this, retailers traditionally have made available to consumers the wallpaper sample books they purchase from manufacturers. They have also provided consumers with information through the use of

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[2] Similarly, the analysis set forth in *Monsanto* and *Matsushita* do not apply when a plaintiff has offered direct evidence of concerted action. *Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d 1335, 1338 (3d Cir. 1987). *See also In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F.2d 432, 441 (9th Cir. 1990).

[3] Our review does not include consideration of evidence which was the subject of the three pending motions to supplement the record. Nor will we consider citations to evidence in F. Schumacher & Co.'s brief which was not of record before the district court.

promotional materials and showroom displays. The purchase of sample books, establishment of a showroom and hiring of knowledgeable sales personnel are costly endeavors and, as one might expect, these costs are reflected in higher prices to consumers. Manufacturers have encouraged retailers to incur these costs, however, because of a prevailing notion that their products sell better when marketed thus.

In recent years, a new breed of retailer has emerged. Some companies now accept orders from consumers all over the United States who call toll-free telephone numbers to order wallpaper after having availed themselves of the sample books, displays and assistance offered by conventional retailers. Today, purchasers may visit a conventional retailer's showroom, peruse the sample books, note the brands and product numbers of the patterns they like, and then go home and order wallpaper at a discount from an 800-number dealer. This informed decision has, of course, been funded in part by retailers who will realize no return on their investment. The 800-number dealer will arrange a "drop shipment" directly from the manufacturer to the purchasers' homes.[4]

Both conventional retailers and 800-number dealers are members of the National Decorating Products Association (the "NDPA"), a trade association comprised of independent retailers who sell a variety of decorating products. The NDPA has about 3,300 members who operate approximately 8,500 retail locations. Its policy is established and its business conducted by an 18-member board of directors. It sponsors a number of trade shows and educational

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[4] In the nomenclature of the marketplace, these 800-number dealers are "free-riders," who reduce or eliminate service to create price competition but who benefit from services such as wallpaper sample books, salesperson advice and showroom displays paid for and provided by other, full-service retailers. *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 55 (1977); *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1376-77 (3d Cir. 1992).

programs for its members each year. It also publishes a monthly industry news journal titled *Decorating Retailer*, and it formerly published a similar newsletter called *Wallcovering Industry News*.

A.

In the late 1970's and early 1980's, conventional retailers in the NDPA threatened to cease purchasing products from manufacturers who continued to do business with the 800-number dealers, whom they referred to as "pirates." The NDPA itself actively campaigned against 800-number dealers by lobbying manufacturers to recognize the advantages of conventional retailing and by encouraging them to "level the playing field" between 800-number dealers and conventional retailers.

For example, Robert Petit, NDPA's executive vice president and chief executive officer, spoke to manufacturers, including Michael Landau, president F. Schumacher & Co. ("FSC") on this subject. Appendix ("App.") at 190-97, 202. In February, 1983, Petit sent a letter on NDPA letterhead urging retailers to request from manufacturers sample books that did not reveal retail prices. Depriving consumers of this information, Petit argued, would make it more difficult for them to avail themselves of an 800-number dealer's discount. App. at 523. The NDPA also marketed a "sales piracy kit" for conventional retailers to use in disguising or concealing pattern numbers and price information on sample books so that consumers could not so easily acquire the information and then order elsewhere. App. at 271-73, 407.

In 1985, the Federal Trade Commission ("FTC") issued a complaint against NDPA because of these activities. In 1986, the parties entered into a consent decree which provided in part:

NDPA . . . shall cease and desist from:

A. Conduct having the purpose or effect of:

* * *

Expressly or impliedly advocating, suggesting, advising, or recommending that any of NDPA's . . . members refuse to deal with any seller of wallcoverings on account of, or that any of NDPA's . . . members engage in any other act to affect, or to attempt to affect, the prices, terms or conditions of sale, or distribution methods or choice of customers of any seller of wallcoverings.

App. at 412. The consent decree also provided:

IT IS FURTHER ORDERED that this Order shall not be construed to prevent NDPA . . . from publishing written materials or sponsoring seminars, or otherwise providing information or its members' views on topics including but not limited to cost accounting principles, and suggested prices and product identification numbers in wallcovering sample books to other sellers of wallcoverings, provided, however, that the information or views are not presented in a manner constituting a violation of any provision contained in Part II of this Order.

Id.[5]

In the aftermath of this settlement, as required by the consent decree, NDPA circulated a summary of the consent order in which it informed members that NDPA, as a group of competitors, was "already considered to be an

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5 We may, of course, consider evidence of activity necessitating the entry of the consent decree, as well as the terms of the consent decree itself, as part of the overall picture, or potential evidence of a pattern of conduct. *See Big Apple BMW*, 974 F.2d at 1361; *cf. Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

'agreement.'" App. at 430. The NDPA guidelines for conducting meetings, drafted shortly before entry of the consent decree, also acknowledge that "a trade association is, by definition, a combination of competitors." App. at 740. The guidelines further provide that before a chapter officer delivers a speech or makes a presentation at a meeting, he or she should state that the views expressed are his or her own and not those of the NDPA or any chapter. App. at 743.

Since the entry of the consent decree, NDPA has informed its members that it may no longer assist them in urging manufacturers to act against 800-number dealers. One poll showed that some members have resigned because the NDPA is "not doing anything in regard to the sales piracy issue." App. at 200. Petit, however, has continued to impart to manufacturers, including Landau, his view of the advantages of conventional retailing over other methods of marketing wallcovering, such as 800-number sales. App at 198.

B.

The sentiment against 800-number dealers continued to escalate even after the consent decree was entered. *Decorating Retailer* published several letters from NDPA members, including some retailers who were former or current NDPA officers, urging action against the 800-number dealers. Its editor, John Rogers, often solicited comment for the letters column by sending a variety of articles from a forthcoming issue to a number of people in the industry. In each issue of *Decorating Retailer*, a standard statement appeared in the letters column apprising the reader that: "The editor reserves the right to edit to fit space limitations or publishing policies. Opinions expressed are those of the writer and not necessarily those of the editor." *E.g.*, app. at 496.

Decorating Retailer and *Wallcovering Industry News* also printed several news articles about 800-number dealers, most of which used the term "pirates" among other characterizations to describe them. In May, 1988, one editorial -- a *Perspective* column in *Decorating Retailer* – stated that "[t]here are increasing signs that the retailer's voice crying in the wallcovering wilderness is being heard," and cited many developments in the industry, such as "a sudden advent of bar coding kits for retailer protection of sample book pattern numbers," as signs that wallpaper suppliers were responding to retailers' needs. App. at 758.

C

Undoubtedly, FSC, a leading manufacturer which had always promoted the traditional method of marketing wallcoverings, heard the complaint. In July, 1988, it announced a drop shipment surcharge on wallcovering deliveries directly to consumers, to take effect in September, 1988. App. at 298-99. Under this new policy, FSC would impose a 7 percent surcharge on every order requesting drop shipment. Obviously, this would have the effect of increasing the 800-number dealers' costs while decreasing their ability to compete on the basis of price with conventional retailers.

The minutes from FSC's management committee meeting in April, 1988, state that it considered the policy to be a signal to conventional retailers that FSC was trying to help them. App. at 290. A draft press release, later revised, identified the protection of dealers from piracy as one reason for the surcharge. *Compare* app. at 298-99 *with* app. at 1364-65. Minutes from September, 1989, reveal that the management committee viewed the drop shipment surcharge as "a good first step" against 800-number dealers. App. at 304.

Beyond merely responding to dealer complaints, FSC also claimed that the surcharge was, in part, intended to recoup increased costs of drop shipments. It did not, however, employ any particular formula or calculations to arrive at its surcharge figure or to determine its basis for recoupment. Nor did it consult any source regarding or otherwise study such costs, although the record contains statements by another manufacturer indicating that his costs for drop shipments were no higher than for shipments to stores. App. at 148-49, 622.

Predictably, retailers responded favorably to the imposition of the surcharge. For example, in September, 1988, a *Decorating Retailer* editor's note responding to a letter about 800-number dealers' advertisements stated that "there are signs that telling your troubles to suppliers eventually will be heard and some remedy may result." App. at 485.

Yet the retailers were not entirely satisfied. In January, 1989, at a convention in Halifax, Nova Scotia, Petit revisited the issue of 800-number dealers and the problems they posed for the industry. An August, 1989 memo shows that Petit spoke to at least one manufacturer about "the anger felt by the retailers in lack of support from the wallcovering industry." App. at 185-86. During this period, NDPA officer Clyde Morgan also expressed "concern about the 800-number and the effect it was having on me" at a meeting of industry leaders. App. at 183.

The fall 1989 planning session at FSC also reflected continuing concerns about 800-number dealers. In September, 1989, soon after an NDPA meeting, Landau stated at a management committee meeting that the surcharge was a good first step but that other measures were necessary. App. at 304. An October, 1989 memo asked whether "we [should] make another anti-pirate move? If so, what?" App. at 793. In November, 1989, Landau reported to the management committee what he had learned at an NDPA trade show: "retailers squeezed by mass market &

800 #'s." App. at 307. The minutes from that committee's meeting also include the following entry: "800 #s: Meeting with attorneys next week to formulate new strategy." App. at 309.

D.

In January, 1990, FSC announced a local trading policy to be implemented in March, 1990. App. at 694-97. FSC dealers would be prohibited from selling FSC products outside of their "local trading area," thus effectively prohibiting 800-number dealers from selling FSC's products nationwide through their toll-free telephone numbers. Immediately after this policy was announced, Petit circulated a copy of it to the NDPA board of directors, saying, "This is a major step forward in our battle against the 800-number operators." App. at 693. He also sent a letter to Landau on NDPA letterhead stating, "On behalf of the members of our decorating products associations, I want to express our appreciation of your actions." App. at 700.

Five FSC executives testified that the purpose of the local trading area policy was to ensure that FSC dealers would realize a return on their investments in sample books and other FSC overhead. App. at 1215, 1218-19, 1222-23, 1238-40, 1249-50, 1340-43, 1520-22, 1550-52. FSC's vice president of sales testified that if FSC had not taken action against the 800-number dealers, it "would continue to have resistance to purchasing sample books with the piracy issue." App. at 691. Indeed, there were several references in planning meetings to safeguarding against free riders and supporting conventional retailers.

Shortly thereafter, according to *Decorating Retailer* and *Wallcovering Industry News* articles, NDPA president John Wells spoke at a trade show in Anaheim, California. The articles describe Wells as urging that "[i]nsisting on supplier support rather than coding books is the answer to piracy

problems besetting wallcovering retailers." App. at 440. At the same show Petit, according to one of the articles, applauded manufacturers' efforts to fight 800-number dealers. *Id.* In accordance with NDPA guidelines, Wells specifically stated that his views were his own as an independent retailer, but the articles refer both to him and to Petit in their NDPA capacities.[6]

In May, 1990, Rogers wrote a *Perspective* column in which he discussed the retailers' opposition to 800-number dealers, reviewed some of the methods retailers had adopted to guard against 800-number dealers' taking their business, and stated, "ultimately, the answer for the individual dealer is that given by Wells: 'I will support those who support me.'" App. at 167. Rogers testified that while the *Perspective* column does not represent the policy of the NDPA, to his knowledge there has not been an occasion when a comment published in it has contravened NDPA's policies.

Both before and after it instituted the policies in question, FSC received letters from retailers urging it to take action against the 800-number dealers. Meanwhile, during this period the FTC repeatedly responded to inquiries from plaintiffs with the assurance that, in its view, NDPA was in compliance with the consent decree entered into in 1986.

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[6] FSC and NDPA argue that these articles constitute inadmissible hearsay. Plaintiffs respond that the articles are admissible as statements of NDPA, having been published in its own publications. *See* Fed. R. Evid. 801(d)(2) (statements are not hearsay if they are offered against a party and are statements of which the party has "manifested his adoption or belief in its truth"). We agree: an employee of NDPA had to have written these articles, which were adopted by NDPA when it published them in *Decorating Retailer* and *Wallcovering Industry News*. Wells' statements as reflected in the articles are, therefore, admissible.

E

Anti-800 number dealer sentiment was not confined to retailers' ranks; manufacturers were also discussing 800-number dealers among themselves. Between 1988 and 1990, wallpaper manufacturers discussed 800-number dealers at meetings of the Wallcovering Manufacturers Association ("WMA"), an organization in which Landau served as a member of the board of directors.

In April, 1988, for example, Landau reported to the FSC management committee that there had been "extensive discussion pirate situation" at the WMA meeting in Hilton Head. App. at 292. Manufacturers also discussed bar-coding, in the context of either "pirate-proofing" sample books or standardizing labels and shipping containers. FSC discussed with other manufacturers steps they were taking to combat 800-number dealers, such as engaging in cooperative advertising, imposing state sales taxes and imposing local trading policies.

800-number dealers were also discussed at conventions sponsored by a chain of wallcovering stores called Wallpaper-To-Go. App. at 313, 315. FSC officials and other wallcovering manufacturers to take action against the 800-number dealers, however. *See* FSC's brief at 42.

Other manufacturers reacted against the 800-number dealers in much the same fashion as FSC did. In April 1988, the owner of one company wrote an open letter to manufacturers about 800-number dealers. In it, he suggested that a task force be formed to establish an "effective, standard and universal method of '[p]irate-[p]roofing' sample books." App. at 884. At least one manufacturer took a step in that direction and coded its sample books so that style and price information could not easily be discerned. App. at 139-41. Another imposed a local trading policy, app. at 130-38, 151, and another tried,

but discontinued, a cooperative advertising program with conventional retailers. App. at 127-28. By August, 1989, two more manufacturers had imposed a drop shipment surcharge. App. at 160, 789.

III.

In May, 1990, plaintiffs filed suit against NDPA and FSC. Their amended complaint, filed in January, 1991, contained twelve counts, the first four of which provide the central focus for this appeal. In Count I, they alleged that "[t]he individual retail wallcovering dealers, acting through the NDPA" violated section 1 of the Sherman Act by entering into a horizontal conspiracy to eliminate the competition posed by 800-number dealers. In Count II, the plaintiffs alleged that in response to the pressure exerted by the NDPA, FSC joined NDPA in a vertical conspiracy similarly designed to thwart competition. In Counts III and IV, the plaintiffs alleged that FSC entered into a conspiracy with other, unnamed, wallcovering manufacturers aimed at eliminating 800-number dealers. Specifically, plaintiffs challenged FSC's imposition of the drop shipment surcharge and its adoption of a local trading policy as being directed at them.[7]

Plaintiffs also alleged a claim under section 2(d) of the Clayton Act, 15 U.S.C. § 13(d); state-law antitrust and restraint of trade violations; tortious interference with contracts and prospective contractual relations; fraud and misrepresentation; defamation and commercial disparagement and breach of contract. In turn, FSC asserted various counterclaims against the 800-number dealers.

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[7] Their amended compliant indicates that plaintiffs originally were concerned about two additional FSC policies: FSC's failure to discuss cooperative advertising possibilities with 800-number dealers though it did so with conventional retailers, and FSC's charging state sales tax on drop shipments. These policies, however, are not subjects of this appeal.

The district court granted defendants' motions for summary judgment on Counts I through IV and granted both plaintiffs and defendants summary judgment on various other claims and counterclaims. Thereafter, the parties settled those claims which had not been disposed of, and plaintiffs filed this appeal challenging the district court's decision on Counts I through IV, the state-law antitrust claims, the tortious interference claim and the defamation claim against NDPA.

The district court had jurisdiction over this case pursuant to 28 U.S.C. § 1331, and we exercise jurisdiction pursuant to 28 U.S.C. § 1291.[8] In our analysis of each of the plaintiffs' Sherman Act claims, which allege three distinct antitrust theories of liability, we proceed from the premise that "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

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8 NDPA and FSC argue that we lack jurisdiction over this appeal because the district court failed to enter a judgment on a separate document in accordance with Rule 58 of the Federal Rules of Civil Procedure and had not yet awarded costs in accordance with Rule 54(d) of the Federal Rules of Civil Procedure.

In *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978) (per curiam), however, the Supreme Court recognized that the rules of civil procedure requiring entry of judgment on a separate document should be interpreted in a common-sense fashion. "If, by error, a separate judgment is not filed before a party appeals, nothing but delay would flow from requiring the court of appeals to dismiss the appeal." *Mallis*, 435 U.S. at 385-86. *See also International Brotherhood of Teamsters v. Western Pennsylvania Motor Carriers Assoc.*, 660 F.2d 76, 80 (3d Cir. 1981). The district court's failure to enter judgment in accordance with the dictates of Rule 58 appears to stem from oversight. No other plausible suggestion has been advanced. Thus, we reject this jurisdictional argument.

As to costs, we note that the parties' stipulation of settlement, which disposed of those counts as to which the district court had not granted summary judgment and which was entered as an order by the district court, provided that each party was to bear its own costs, thus implicitly if not actually resolving any Rule 54(d) issue.

At Count I, in which plaintiffs named only NDPA as a defendant, they alleged that conventional retailers, acting through the NDPA, conspired to pressure manufacturers to eliminate them from the marketplace. The district court examined the record for evidence of "officially sanctioned NDPA activity," found none, and ruled that plaintiffs could not meet the "concerted action" requirement because "[t]he NDPA can only act pursuant to a resolution from its board and no such resolution has been identified." App. at 37. We will affirm, although on different grounds. *Erie Telecommunications*, 853 F.2d at 1089 n.10; *Johnson v. Orr*, 776 F.2d 75, 83 n.7 (3d Cir. 1985) (an appellate court may affirm a result reached by the district court for any reason in the record supporting the judgment).

It is both uncontested and uncontestable that NDPA is an association of competent wallpaper dealers. As such, when NDPA takes action it has engaged in concerted action so as to trigger potential section 1 liability. *Weiss*, 745 F.2d at 816 (hospital executive committee's actions are concerted action within the meaning on section 1). "[A]ntitrust policy requires the courts to seek the economic substance of an arrangement, not merely its form." *Weiss*, 745 F.2d at 815. The actions of a group of competitors taken in one name present the same potential evils as do the actions of a group of competitors who have not created a formal organization within which to operate. *See id.* at 816 ("[w]here such associations exist, their actions are subject to scrutiny under section 1 . . . in order to insure that their members do not abuse otherwise legitimate organizations to secure an unfair advantage over their competitors"). *See also Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); *Associated Press v. United States*, 326 U.S. 1 (1945).

We agree with NDPA's contention, however, that NDPA can only be held liable for concerted action if it acted as an entity. *See Nanavati v. Burdette Tomlin Memorial Hospital*, 857 F.2d 96, 117-18 (3d Cir. 1988) (*Weiss* holds that when a group of competitors "acts as a body, it constitutes a

'combination'"). In *Nanavati*, we held that although the actions of a hospital executive committee might constitute concerted action, the committee does not engage in concerted action when it does not "act[] as an entity in furtherance of the conspiracy." *Id.* at 119. As we explained there:

> Our conclusion in *Weiss* was premised on the concept that where individual actors take actions as a group, they are a combination for the purposes of those actions. Where no group action is taken, no such combination can exist. In short, we did not hold in *Weiss* that because the actions of the medical staff constitute the actions of a combination, even where there is no allegation that the staff acted as a group, the 'contract, combination or conspiracy' requirement has been met. Such a group is a combination as a matter of law only for the actions it takes as a group.

Id.

In *Nanavati*, the plaintiff did not maintain that the executive committee took any action as a group. *Id.* Instead, he pointed to the actions of medical staff members who were not on the executive committee as the basis for his claim. He argued that the record contained evidence of a boycott against him by members of the medical staff, so the jury had not erred in finding that the executive committee had participated in the boycott. Our search for evidence that members of the executive committee had acted in furtherance of the boycott yielded none; thus, we affirmed the district court's grant of judgment n.o.v. to the executive committee.

Nanavati teaches that a concerted action does not exist every time a trade association member speaks or acts. Instead, in assessing whether a trade association (or any other group of competitors) has taken concerted action, a

court must examine all the facts and circumstances to determine whether the action taken was the result of some agreement, tacit or otherwise,[9] among members of the association. *See generally Nanavati*, 857 F.2d at 119-20.

Judicial scrutiny of alleged concerted action, undertaken to determine whether it was the result of an agreement, is an intricate endeavor. In the straightforward case, such as when a stock exchange requires disconnection of a nonmember's private telephone wire, or a hospital executive committee votes to deny staff privileges to a member, the action is obviously a result of an agreement which is stamped with the imprimatur of the association by a vote or passage of a resolution. *See, e.g., Silver*, 373 U.S. at 347; *Weiss*, 745 F.2d at 816. We can hardly say, however, that this case falls within that genre.

Here, plaintiffs rely on *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982), to argue that NDPA took concerted action when its officers spoke out in protest against the 800-number dealers' business methods and when NDPA publications included letters complaining about 800-number dealers. In *Hydrolevel*, the Supreme Court, relying on general principles of agency law, determined that the American Society of Mechanical Engineers ("ASME") could be held liable for the actions of its officers and agents taken with apparent authority. Writing for the majority, Justice Blackmun held that imposing liability based upon apparent authority comported with the intent of the antitrust laws because ASME possessed great power and the codes and standards it issued influenced policies and affected entities' abilities to do business. *Hydrolevel*, 456 U.S. at 570. "When it cloaks its

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[9] It would be incorrect to require an official board resolution, or other officially sanctioned activity, to impose liability on NDPA. Recognizing that perpetrators of antitrust violations are often sophisticated businessmen, courts regularly permit agreements to be shown by circumstantial evidence. *See Big Apple BMW*, 974 F.2d at 1364; *Theatre Enterprises, Inc. v. Paramount Distributing Corp.*, 346 U.S. 537, 540-41 (1954).

subcommittee officials with the authority of its reputation, ASME permits those agents to affect the destinies of businesses and thus gives them the power to frustrate competition in the marketplace." *Id.* at 570-71. Imposing antitrust liability on the association for the actions of its agents would encourage ASME to police its ranks and prevent the use of associations by one or more competitors to injure another. *See generally id.* at 571-73. *See also* M. Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 Geo. L. J. 395, 417-18 (1986).[10]

In deciding *Hydrolevel*, the Court rejected ASME's argument that it should not be held liable unless its agents had acted with an intent to benefit it. This argument was irrelevant, the Court held, in part because "[w]hether they intend to benefit ASME or not, ASME's agents exercise economic power because they act with the force of the Society's reputation behind them." *Hydrolevel*, 456 U.S. at 574. The Court viewed the imposition of liability regardless of the agents' intent as more consistent with the purposes of antitrust law, since this would encourage ASME to police its agents so as to prevent the anticompetitive effects of their using its name and power even in individual efforts at restraining trade. *Id.*

The issue presented here, however, is markedly different. In *Hydrolevel*, the plaintiff had named three defendants in its conspiracy claim. Although it is difficult to

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10 Judge Boudin notes that the Supreme Court in *Hydrolevel* viewed ASME as an "extra-governmental agency" regulating its own industry. *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 570 (1982). *See* M. Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 Geo. L. J. 395, 417 (1986). Indeed, *Hyudrolevel* and many other trade association cases have focused on this role and on associations' standard-setting or industry-regulating activities. *See* e.g. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985); *Moore v. Boating Industry Assoc.*, 819 F.2d 693 (7th Cir. 1987). *See generally* ABA Antitrust Section, *Antitrust Law Developments* 86-91 (3d ed. 1992). Notably, the case before us does not involve standard-setting or industry-regulating activity on NDPA's part.

discern the exact contours of the alleged conspiracy from the *Hydrolevel* opinion, it is quite clear that the plaintiff there was not seeking to hold ASME liable for concerted action solely on the basis of actions taken by one official with apparent authority. The conspiracy alleged apparently was between the chairman of an ASME standard committee and the plaintiff's primary competitor; the question before the Court was whether ASME could be held liable for its agent's anticompetitive activity in participating in the conspiracy even though no one else at ASME had authorized the violation. Because a conspiracy was alleged to have taken place between the ASME official and another conspirator, the Court did not address the question of whether two or more members of ASME were utilizing that organization as a vehicle for concerted anticompetitive activity.

We believe that the *Hydrolevel* rule that an association's economic power may justify its being held liable for the actions of its agents cannot be extended to defeat the "concerted action" requirement of section 1. Imposing liability on an association, as we did in *Weiss*, does not abolish or diminish the first element of section 1 liability; it merely recognizes that a group of competitors with a unity of purpose are engaged in concerted action, whether or not they act under one name. As we explained in *Nanavati*, in the absence of a co-conspirator, an association's actions satisfy the concerted action requirement only when taken in a group capacity. For this reason, even actions taken by a person with apparent authority to act on behalf of an association should not result in section 1 liability in the absence of a co-conspirator, unless the actions in question represent an attempt by the association, rather than the actor, to restrain trade. Thus, we cannot agree that *Hydrolevel* requires imposition of section 1 liability upon NDPA, in the absence of a co-conspirator, without some indication that two or more members of NDPA were utilizing it as a vehicle for concerted anticompetitive action.

Having narrowed our inquiry to whether the actions taken and statements made by NDPA officials were proscribed by *Weiss* and *Nanavait*, we agree with the district court's determination that the evidence was insufficient to proceed beyond summary judgment. On the record before us, to adopt the suggestion that NDPA's members either agreed that it should threaten manufacturers with a boycott unless they took steps to injure the 800-number dealers, or believed that NDPA was doing so on their behalf and acquiesced in its effort, would require an exercise in conjecture. *Cf. Moore v. Boating Industry Assoc.*, 754 F.2d 698, 711 (7th Cir. 1985), *vacated on other grounds* 474 U.S. 895 (1985), *on remand* 819 F.2d 693 (7th Cir. 1987) (combination of threat of denial of certification to members using a certain product, made by association officer acting with apparent authority, plus "subsequent action on the part of the Association members in refusing to purchase" the product constituted concerted action).

For example, plaintiffs point to evidence of conversations about 800-number dealers which Petit had with a number of wallcovering manufacturers as indicating that NDPA acted to injure them. *See* app. at 185, 190-98, 201-07, 212-29, 407, 416-19, 693-99, 700. Neither complaints by dealers nor complaints on behalf of many dealers communicated by the president of their trade association constitute antitrust violations, however. Absent indications that Petit, while representing the NDPA, coerced (or attempted to coerce) manufacturers into cooperating in eliminating 800-number dealers, Petit's conversations, even if undertaken while representing the NDPA, show nothing more than the legitimate voicing of complaints to manufacturers. Nothing in either the antitrust laws or the FTC consent decree prohibits the NDPA from voicing complaints.

Plaintiffs also point to the statements regarding 800-number dealers which Wells, Petit and Morgan made at NDPA conventions as evidencing NDPA's campaign against

them. *See* app. at 167, 182-84, 440. It is undisputed, however, that NDPA officials were instructed, and their general practice was, to preface their remarks with the explicit disclaimer that they were speaking in their individual rather than official capacities. Indeed, Wells and Morgan specifically testified that they had done so. *See* app. at 183-84, 2245-46. In the face of such uncontradicted evidence, it would be unreasonable for a jury to infer that these officials were speaking as representatives of NDPA. Moreover, even if it were reasonable to infer that they were speaking in their official capacities, the statements constituted nothing more than further complaints about 800-number dealers and a suggestion that retailers should support the manufacturers who supported them in their sales efforts. Nothing in the record before us indicates that dealers cooperated in this effort by doing so, or that they refused to support those manufacturers who did not support them.

Finally, plaintiffs refer to letters from NDPA members and editorials and articles about 800-number dealers which were published in *Decorating Retailer* and *Wallcovering Industry News*. *See* app. at 468, 479, 485, 490-92, 495, 756-59, 784, 837-38. Letters revealing members' views, and articles and editorials expressing frustration and anger with the 800-number dealers, however, do not evidence an agreement among the members of NDPA who read these publications to pressure manufacturers into treating 800-number dealers less favorably than traditional retailers.

In sum, while an occasional letter or article may imply a call for action from fellow retailers, and while NDPA officers were hardly reticent in voicing members' complaints about 800-numbers dealers, even considering all of the evidence in context, there is insufficient evidence to support a reasonable inference that NDPA members agreed to act through the NDPA to pressure manufacturers to take steps against 800-number dealers.

For these reasons, we will affirm the district court's grant of summary judgment at Count I.

V.

At Count II, plaintiffs alleged that FSC responded to pressure from the NDPA by conspiring with it to eliminate 800-number wallpaper dealers from the marketplace. Their allegations flow directly from evidence of conventional retailers complaining to FSC and other manufacturers about plaintiffs' "free-riding." This type of evidence is as consistent with procompetitive activity as with allegedly illegal activity. *Monsanto*, 465 U.S. at 763. In *Monsanto*, a case which also involved an alleged conspiracy to terminate a dealership relationship because of other dealers' complaints, the Supreme Court noted:

> Permitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about 'in response to' complaints, could deter or penalize perfectly legitimate conduct. [C]omplaints about price cutters 'are natural - and from the manufacturer's perspective, unavoidable - reactions by distributors to the activities of their rivals.' Such complaints . . . 'arise in the normal course of business and do not indicate illegal concerted action.' . . . Moreover, distributors are an important source of information for manufacturers. In order to assure an efficient distribution system, manufacturers and distributors constantly must coordinate their activities to assure that their product will reach the consumer persuasively and efficiently. To bar a manufacturer from acting solely because the information upon which it acts originated as a price complaint would create. an irrational dislocation in the market.

Monsanto, 465 U.S. at 763-64. Thus, we exercise a measure of caution when drawing inferences from such facts; "a fine line demarcates concerted action that violates antitrust law from legitimate business practices." *Big Apple BMW*, 974 F.2d at 1363, *citing Monsanto*, 465 U.S. at 762-64.[11]

In *Big Apple BMW*, plaintiffs alleged that BMW of North America, Inc. ("BMW") had refused to grant automobile dealerships to them because other dealers had complained about plaintiffs' high-volume, deep-discount business methods. BMW asserted a variety of legitimate business reasons for its actions, including a concern about plaintiffs being "free-rider" dealers. Plaintiffs, however, presented evidence that they would not have posed the "free-rider" problem BMW feared, *see Big Apple BMW*, 974 F.2d at 1377, and that a person with the same advertising tactics as theirs (high-volume, deep discount "sellathons") had been granted a BMW franchise. *Id.* at 1378. They also presented evidence tending to discredit the other reasons BMW proffered to support its refusal to grant them a franchise. *Id.* at 1377-80.

We reversed the district court's grant of summary judgment because plaintiffs had advanced evidence tending to exclude the possibility of BMW's having acted independently from the complaining dealers. They had "countered each alleged reason with evidence that both discredits BMW NA's witnesses and provides independent support for the [plaintiffs'] claim that BMW NA and its

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11 Citing *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988), the dissent contends that the teachings of *Monsanto* do not apply to a so-called "hybrid case," in which joint coercive action by dealers allegedly results in a manufacturer's acting to injure other dealers. *See Business Electronics*, 485 U.S. at 730 n.4. Such a case (of which the one before us is an example) combines elements of horiztonal and vertical conspiracies; this may affect the decision of whether a *per se* or a rule of reason standard will apply when judging liability, *cf. Pennsylvania Dental Assoc. v. Medical Services Assoc. of Pennsylvania*, 745 F.2d 248, 259 (3d Cir. 1984), but it does not necessarily follow that the *Monsanto* teachings do not apply. We believe that the Court's foonote in *Business Electronics* merely states that a restraint is termed horiztonal or vertical based upon the type of agreement reached, rather than its effects.

dealers acted in concert to repel" plaintiffs' competition. *Id.* at 1380.

Similarly, in *Arnold Pontiac-GMC, Inc. v. General Motors Corp.*, 786 F.2d 564 (3d Cir. 1986), we reversed a grant of summary judgment because defendant General Motors Corporation ("GMC") first favorably viewed plaintiff's franchise application, then heard its dealers' disapproval and threatened non-cooperation, and then denied the application. GMC had not expressed concern about the plaintiff's franchise application until it heard its dealers' complaints. We held that "we must infer that [the dealers'] conduct contributed to GMC's decision not to award [the plaintiff] the Buick franchise." *Arnold Pontiac*, 786 F.2d at 573.

In marked contrast to *Big Apple BMW* and *Arnold Pontiac*, here it is conceded that the 800-number dealers are free riders. It is also undisputed that FSC has for years sold sample books and promotional materials and has encouraged its dealers to invest in these and other overhead costs in order to provide better service to their customers. Plaintiffs cannot, and do not, argue that FSC imposed the two policies at issue for any reason other than it simply believed its products were best sold through conventional retailers rather than 800-number dealers. Thus, unlike the scenarios in *Big Apple BMW* and *Arnold Pontiac*, there was no abrupt turnaround in this case. FSC had for years recognized the importance of selling service; indeed, part of its business is selling sample books and promotional materials to provide that service. When it became convinced that the conventional retailers who provided such services were being adversely affected by the 800-number dealers, its actions were entirely consistent with its previously held view of its own self-interest.

Big Apple BMW, in fact, bears little resemblance to this case. In that case, plaintiffs applied for a dealership at three locations. They produced evidence that BMW had

encouraged them to apply; that as to each location, competing dealers complained to BMW about anticipated price-cutting, and that BMW abruptly reversed its position on the plaintiffs' applications. Plaintiffs' evidence further revealed that a BMW vice president informed the holder of one of the franchises plaintiffs sought that the plaintiffs' application could fail because they were price cutters. An agent of BMW admitted that "it was the dealers who did not want [plaintiffs] to get the [Philadelphia] franchise, it wasn't BMW who rejected them." *Big Apple BMW*, 974 F.2d at 1372.

Plaintiffs also presented evidence that the reasons given by BMW for denying the franchises, while purporting to be justifications from BMW's point of view, were pretexts, thus permitting an inference that self-interst did not motivate its actions. In 1981, for example, BMW said the plaintiffs were not accepted as franchisees because they had tried to bribe a BMW employee. We took note of and were impressed with the fact that, despite this alleged bribery, in 1982 BMW urged the plaintiffs to reapply. *Id.* at 1368. The concern expressed about the alleged bribe apparently did not surface until BMW needed a reason to refuse plaintiffs' application. *Id.* at 1369.

Despite any indication to the contrary which might result from a broad reading of these decisions, Supreme Court authority makes clear that antitrust liability cannot result from the fact that termination came about in response to dealer complaints. *Monsanto*, 465 U.S. at 763. *Monsanto* teaches that the ultimate inquiry is not whether retailers' complaints caused FSC to respond with its drop shipment surcharge and local trading area policy, but whether FSC agreed, tacitly or otherwise, with retailers to try to injure 800-number dealers as a result of NDPA's coercion.

Plaintiffs emphasize a number of items in attempting to support their claim at Count II. Each of these, however, tends to demonstrate no more than that FSC adopted and implemented its drop shipment surcharge and local trading

policy in response to its retailers' complaints. Such activity does not violate section 1. *See Monsanto*, 465 U.S. at 763 ("[p]ermitting an agreement to be inferred . . . from the fact that termination came about 'in response to' complaints could deter or penalize perfectly legitimate conduct"); *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 878 F.2d 801, 805 (4th Cir. 1989).

For example, plaintiffs place great stock in FSC's management committee minutes, which indicate that FSC was attempting through its new policies to tell retailers that it was trying to help them. The minutes also reveal that Landau learned at an NDPA meeting that FSC's drop shipment surcharge was a "good first step," but it had to take further steps to help its traditional retailers. *See* app. at 290, 304. These statements reflect no more than a recognition by FSC than its retailers were being injured by the 800-number dealers and an attempt to respond to their concerns in that regard, actions which are entirely legitimate in the aftermath of *Monsanto*.

Plaintiffs also focus on letters which many retailers sent to manufacturers, including FSC, urging that they "do something" about 800-number dealers. *See* app. at 517, 519, 521-22, 526, 545, 550-75. These letters similarly reveal nothing more than that retailers complained to FSC. They do not tend to show that FSC went beyond responding to the complaints and actually agreed with retailers to attempt to eliminate the competition posed by the 800-number dealers.

To support an inference that FSC crossed the line between proper and improper action, plaintiffs highlight two examples of what they claim to be FSC's assertion of pretextual reasons for its actions. (If FSC had, in fact, advanced reasons for its actions which were pretextual, this would tend to support an inference that it had indeed acted as part of a conspiracy with conventional retailers. *See Big Apple BMW*, 974 F.2d at 1374-80.)

First, plaintiffs point to evidence in FSC's management committee minutes which contrast the "objective" of its drop shipment surcharge ("To make statement to industry that we are trying to help them") with the "rationale" for this surcharge ("To protect legitimate customers, [t]o increase margins in this area"). App. at 290. They also point to a parallel distinction between FSC's original and published press releases announcing the surcharge. The original press release stated:

> In direct response to retailer requests, we at F. Schumacher & Company are proud to announce that we will assertively support our dealers in their local trading areas and protect them from sales piracy by adding a seven percent surcharge onto all drop shipments . . . While bar coding is a breakthrough for the industry in terms of product identification we feel that it alone is not an entirely effective deterrent against sales piracy . . . . Our approach attacks the problem at its root and makes the accounts who drop ship feel the effects, rather than leaving the responsibility of policing to the retailers.

App. at 298-99. The final press release stated that the policy was not designed to combat "piracy" but rather to

> help insure that our consumers receive the best possible service and that our wallcovering brands are supported in the most effective and appropriate manner at retail . . . This policy seeks to encourage all dealers to concentrate their selling efforts exclusively within their own trading areas where they can provide service directly to the consumers to whom they sell the product.

App. at 486.

Plaintiffs argue that these inconsistencies in and contrasts between the internal and the public explanations of the drop shipment policy reveal that FSC was attempting to disguise the true reason for its actions. We disagree; even granting plaintiffs reasonable inferences, the two statements and the two press releases instead seem in harmony with FSC's explanation, which it has consistently maintained, that it took the action it did to protect the investments made by traditional retailers. That FSC felt a need to use more genteel language when explaining to the public what it could internally refer to as efforts to combat "piracy" does not imply a sinister motive. FSC is permitted to respond to dealer complaints, and it did just that.

Second, plaintiffs argue that although FSC acknowledges that dealer complaints were part of the reason for its surcharge, at one time it also stated that the surcharge was intended in part to recoup increased costs associated with drop shipments. FSC did not, however, use mathematical calculations to arrive at its surcharge figure; it neither consulted anyone regarding nor studied such costs, and the record contains statements by another manufacturer indicating that his costs for drop shipments were no higher than for shipments to stores. This, plaintiffs argue, underscores the arbitrariness of the surcharge and evinces FSC's true, sinister motive.

A lack of market research, while perhaps adding luster to plaintiffs' contention that the surcharge was arbitrarily determined does not necessarily invite an inference that FSC's statement was an attempt to conceal a conspiracy. It is true that the seven percent figure did not reflect an analysis of FSC's costs; however, this does not indicate that FSC was not pursuing its self interests in imposing it. The record affirmatively indicates that the seven percent figure was arrived at as one which would provide sufficient incentive for traditional retailers to continue to invest in service -- a

reason entirely consistent with FSC's explanation for its actions and rendering unreasonable any inference of sinister motive. See app. at 149-50; H.L. Hayden Co. of New York, Inc. v. Siemens Medical Systems, Inc., 879 F.2d 1005, 1014 (2d Cir 1989) (mere fact that a business reasons advanced to explain actions is undermined does not alone justify inferring that the actions resulted from a conspiracy). Plaintiffs' attempt to portray as disingenuous FSC's assertion of an economic basis in support of its decision to implement the surcharge is unavailing.

Plaintiffs note a further piece of evidence which they claim tends to support their theory in liability at Count II: the memorandum Petit circulated among the NDPA board of directors after FSC imposed its local trading area policy in January, 1990. In it, Petit stated: "Enclosed is a copy of FSC's new marketing and advertising policy. This is a major step forward in our battle against the 800 number operators. Enumerated point 12, in effect means that FSC will no longer be selling [to] the 'sales pirate.'" App. at 693.

Subsequent ratification of a manufacturer's actions may sometimes tend to indicate that an agreement existed between the ratified and the manufacturer, but nothing in this memorandum does so. Instead, at most, the memorandum reveals that Petit recognized that FSC's new policy would be beneficial to traditional retailers and wanted to share both the policy and that information with the board.

While separate enumeration and discussion of the evidence upon which plaintiffs rely in support of Count II has been necessary to make clear what we believe its significance to be, we have also considered the evidence as a whole in accordance with *Continental Ore*. We nonetheless conclude, however, that the plaintiffs have simply failed to present evidence tending to exclude the possibility of independent action, as they must to survive summary judgment under *Monsanto*. They have not countered FSC's

alleged reasons for its actions with evidence that both discredits the reasons and provides independent support for their conspiracy claim. *See Big Apple BMW*, 974 F.2d at 1380. Accordingly, we will affirm the district court's grant of summary judgment at Count II.

VI.

At Counts III and IV, plaintiffs allege that FSC conspired with other wallcovering manufacturers to injure the 800-number dealers. We will affirm the district court's grant of summary judgment as to these counts because plaintiffs' evidence tends to show only an opportunity to conspire, not an agreement to do so.

Certainly, direct evidence (or a direct inference) of an agreement between FSC and other manufacturers regarding 800-number dealers could enable plaintiffs to show concerted action. The evidence of an agreement, however, amounts to nothing more than communications on the 800-number subject. Communications alone, although more suspicious among competitors than between a manufacturer and its distributors, do not necessarily result in liability. *Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879, 894 (3d Cir. 1981). As we have observed, it is only when those communications rise to the level of an agreement, tacit or otherwise, that they become an antitrust violation.

Thus, plaintiffs are left to argue that FSC and other manufacturers conspired based upon their parallel conduct. "[P]roof of consciously parallel business behavior is circumstantial evidence from which an agreement, without more, is insufficient unless the circumstances under which it occurred make the inference of rational, independent choice less attractive than that of concerted action." *Bogosian v. United States*, 561 F.2d 434, 446 (3d Cir. 1977). The circumstances necessary to support such an inference are: (a) a showing that the defendants acted contrary to their

own economic interests; and (b) satisfactory demonstration of a motivation to enter an agreement. *Id., citing Venzie Corp. v. United States Mineral Products Co., Inc.*, 521 F.2d 1309, 1314 (3d Cir. 1975). *See also Petruzzi's IGA Supermarkets, Inc. v. Darling Delaware Co., Inc.*, No. 92-7481, slip op. at 31 (3d Cir. July 13, 1993); *Schoenkopf v. Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 208 (3d Cir. 1980).

In particular, when evidence shows communications which provided an opportunity for agreement, a plaintiff must still produce evidence permitting an inference that an agreement in fact existed. *Venzie*, 521 F.2d at 1313. The evidence must give rise to more than speculation. *Id.*

In *Venzie*, for example, plaintiffs contended that two defendant corporations had agreed to refuse to sell fireproofing material to them. The record contained evidence that defendants had made numerous telephone calls, at least one of which concerned the plaintiffs, to each other and had met for lunch. We held that it was for the jury to assess the credibility of the defendants' assertions that they had not discussed or agreed upon the alleged refusal to deal, but, even disregarding statements to that effect, all that plaintiffs' evidence proved was an opportunity for an agreement, which would not suffice to support a verdict. Plaintiffs had failed to highlight evidence supporting an inference that an agreement in fact existed and thus could not support a verdict. *Venzie*, 521 F.2d at 1312. *See also Tose*, 648 F.2d at 895.

In contrast, a particularly detailed memorandum of a telephone call can give rise to a reasonable inference of agreement. In *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 254 (2d Cir. 1987), for example, the plaintiff survived a summary judgment motion by advancing evidence in the form of detailed memoranda indicating the existence of an agreement.

In this case, it is conceded that manufacturers discussed 800-number dealers, and actions they were taking concerning them, at conventions. The evidence of communications thus falls somewhere between *Venzie*, in which there were no notations of the subject matter of the conversations, and *Apex Oil*, in which the notations implied an agreement. Plaintiffs, however, seek to infer an agreement from those communications despite a lack of independent evidence tending to show an agreement and in the face of uncontradicted testimony that only informational exchanges took place. Without more, they cannot do so. *Cf. Tose*, 648 F.2d at 894 (mere belief of contrary testimony does not prove agreement).

We emphasize that unlike actions such as price-cutting, which provide the classic example of conscious parallelism, FSC's action was in its economic interests. It is simple syllogistic reasoning that if FSC was aware that most of its dealers were conventional retailers, and believed that its products sold better in the conventional setting, it would conclude that it was in its economic interests to keep the conventional retailers satisfied. That FSC may have foregoing some short-term opportunity for sales to 800-number dealers does not suffice to show it acted contrary to its self-interests when it indisputably believed it was acting to benefit itself economically in the long term. *Tose*, 648 F.2d at 895; *see* P. Areeda, *Antitrust Law* § 1415e (1986). FSC's listening to retailers' complaints in no way implies that there was an agreement among manufacturers to do the same. *See Venzie*, 521 F.2d at 1314 ("[t]he absence of action contrary to one's economic interest renders consciously parallel business behavior 'meaningless, and in no way indicates agreement,'" *quoting* Turner, The *Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 681 (1962)); *see also Houser v. Fox Theatres Management Corp.*, 845 F.2d 1225, 1232-33 (3d Cir. 1988) (requiring both actions contrary to economic interests and motive to conspire).

VII.

Remaining for disposition are the plaintiffs' state-law antitrust and tort claims. Although no federal claims remain at this juncture, considerations of judicial economy and fairness militate in favor of our retaining jurisdiction over and deciding the merits of these state-law claims. *Graf v. Elgin, Joliet and Eastern Ry. Co.*, 790 F.2d 1341, 1347-48 (7th Cir. 1986); *Ingram Corp. v. J. Ray McDermott & Co., Inc.*, 698 F.2d 1295, 1317-20 (5th Cir. 1983). *See generally Enercomp., Inc. v. McCorhill Publishing, Inc.*, 873 F.2d 536, 545-46 (2d Cir. 1989). We will affirm the district court's disposition of these claims.

A.

In Count VI, plaintiffs alleged that the defendants violated Pennsylvania antitrust law by engaging in the activity alleged as the basis of Counts I through IV. This allegation rises or falls with plaintiffs' federal antitrust claims. *See Collins v. Main Line Board of Realtors*, 304 A.3d 493 (Pa. 1973); *Schwartz v. Laundry and Linen Supply Drivers' Union*, 14 A.2d 438 (Pa. Super. 1940); plaintiffs' brief at 45; FSC's brief at 47-48. Therefore, our decision with respect to Counts I through IV disposes of Count IV as well.

B.

In Count VII, plaintiffs alleged that FSC and NDPA tortiously interfered with their existing and prospective contracts. Like Count VI, Count VII rises or falls with plaintiffs' antitrust claims. *See Big Apple BMW*, 974 F.2d at 1381-82 ("factual underpinnings of these tort claims are intertwined with the antitrust claims"; antitrust violations or other actions in restraint of trade are examples of improper conduct). Moreover, plaintiffs have failed to demonstrate that they would be able to present evidence tending to prove each element of their tortious interference claims at trial.

To establish a claim of tortious interference with existing contracts, plaintiffs must prove that the defendants intentionally and improperly interfered with their performance of contracts with third persons. *Nathanson v. Medical College of Pennsylvania*, 926 F.2d 1368, 1388 (3d Cir. 1991); *Adler, Barish, Daniels, Levin and Creskoff v. Epstein*, 393 A.2d 1175, 1183 (Pa. 1978). To prove their claims of tortious interference with prospective contractual relations, plaintiffs likewise must prove, *inter alia*, the existence of prospective contracts. *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 471 (Pa. 1979). A prospective contract "is something less than a contractual right, something more than a mere hope[]" *id.*; it exists if there is a reasonable probability that a contract will arise from the parties' current dealings. *Glenn v. Point Park College*, 272 A.2d 895, 898-99 (Pa. 1971).

Plaintiffs have failed to identify with sufficient precision contracts and prospective contracts which were interfered with by the defendants. They have likewise failed to identify an existing contract which was terminated because of the defendants' actions. Nor have they demonstrated a reasonable probability that they would have entered into prospective contracts with third parties but for defendants' alleged interference. *See General Sound Telephone Co., Inc. v. AT&T Communications, Inc.*, 654 F. Supp. 1562 1565-66 (E.D. Pa. 1987). In sum, plaintiffs have failed to advance more than speculation to support their claim of tortious interference; therefore, we will affirm the district court as to this count.

C.

Finally, in Count X, plaintiffs alleged that the NDPA defamed them by publishing articles and editorials referring to 800-number dealers as "pirates." Under Pennsylvania law, a statement is defamatory if it "'tends to so harm the reputation of another as to lower him in the estimate of the community or to deter third persons from associating or

dealing with him.'" *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 923 (3d Cir. 1990), *quoting Birl v. Pennsylvania Electric Co.*, 167 A.2d 472, 475 (Pa. 1960). To prove their claim, plaintiffs must show: (1) the defamatory character of the statements; (2) publication by NDPA; (3) the statements' application to the plaintiffs; (4) an understanding by readers of the statements' defamatory meaning; and (5) an understanding by readers of an intent on the part of NDPA to refer to the plaintiffs. 42 Pa. Cons. Stat. Ann. § 8343(a) (1982); *U.S. Healthcare*, 898 F.2d at 923. The law does not require that a plaintiff be specifically named in an allegedly defamatory statement, for a statement might be defamatory if, by description or circumstances, it tends to identify the plaintiff as its object. *Redco Corp. v. CBS, Inc.*, 758 F.2d 970, 972 (3d Cir. 1985).

Plaintiffs base their defamation claim upon statements referring to 800-number dealers in general as "pirates." Individual group members may sue based upon statements about a group when the statements were directed toward a "comparatively small class or group all of whose constituent members may be readily identified and the recipients of the [statements] are likely to identify some, if not all, of them as intended objects of the defamation." *Farrell v. Triangle Publications, Inc.*, 159 A.2d 734, 736-37 (Pa. 1960). But no claim arises from a defamatory remark directed toward a group show membership is so numerous that no individual member can reasonably be deemed its intended object. *Id.* at 736. Similarly, no claim exists if, for any other reason, a reader could not reasonably conclude that the statements at issue referred to the particular person or persons alleging defamation. *Id.* at 737.

Relying upon record evidence indicating that in 1990 there were only 20 to 25 800-number dealers in the industry (app. at 1123-24), plaintiffs argue that they may base their claim on statements directed at 800-number dealers in general. *Cf.* Restatement (Second) of Torts § 564A, comment c. As noted above, however, a group's size is not the sole

consideration in determining whether individual members may assert defamation claims based upon statements about the group. A group may be relatively small, but statements which disparage it may not serve as a basis for an individual defamation claim unless a reader could reasonably connect them to the complaining individual.

In *Farrell*, for example, one of 13 township commissioners asserted a defamation claim against a newspaper which had published a story implicating "a number of township commissioners and others" in corrupt activity. *Farrell*, 159 A.2d at 736. The Pennsylvania Supreme Court held that the plaintiff had stated a claim for defamation. In so holding, however, the court concentrated not on the size of the group discussed but on whether readers "knew that the plaintiff was one of the thirteen commissioners." *Id.* at 738. We similarly do not end our inquiry upon being apprised that there were between 20 and 25 800-number dealers in 1990; we examine whether the plaintiffs were "sufficiently identified as [objects of NDPA's statements] to justifiably warrant a conclusion that [their] individual reputation[s have] been substantially injured." *Id.* at 736.

Here, there is nothing in the record other than the number of 800-dealers which would support a conclusion that any of the plaintiffs' individual reputations were injured by NDPA's statements about 800-number dealers in general. Indeed, the individual identities of this group's members are, by the very nature of their business, less meaningful than the telephone numbers they promote to facilitate discount purchases. This group appears amorphous and ill-defined when compared to the well-defined group of township commissioners at issue in *Farrell*. Plaintiffs have not produced evidence tending to prove that they belong to such an easily identifiable, cohesive group that a reader would ascribe statements referring to 800-number dealers in general as "pirates" to any of them

individually. Thus, we will affirm the district court's grant of summary judgment on Count X.

VIII.

For the foregoing reasons, we will affirm the district court's grant of summary judgment as to Counts I through IV, VI, VII and X of the plaintiffs' amended complaint.

ROTH, *Circuit Judge*, concurring in part and dissenting in part:

Because I believe the majority has misapplied the precedent relevant to the antitrust claims involved in the present case and misanalyzed the evidence present in the record, I respectfully dissent from the conclusion that the majority reaches in Parts IV and V with regard to Counts I and II of the complaint. Because I believe that Counts VI and VII are intimately linked with Counts I and II, I also dissent from the conclusion the majority reaches in Part VII A and B. I concur with the majority's conclusions in Parts VI and VII C with regard to the remaining counts.

Initially, I would like to emphasize that this case was disposed of by summary judgment; no trial by a factfinder has been held. A court may grant summary judgment only when the submissions in the record "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-side that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,. 251-52 (1986).

In antitrust cases, to establish a violation of Section 1 of the Sherman Act, the plaintiff must prove the existence of a "contract, combination in the form of trust or otherwise, or conspiracy, in restrain of trade or commerce among the

several States, or with foreign nations." 15 U.S.C. § 1. To survive a defendant's motion for summary judgment in a Section 1 antitrust case, a plaintiff "must establish that there is a genuine issue of material fact as to whether [the defendant] entered into an illegal conspiracy [or combination] that caused [the plaintiff] to suffer a cognizable injury." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 485 U.S. 574, 585-86 (1986). The plaintiff must introduce evidence that tends to demonstrate "a unity of purpose or a common design and understanding, or a meeting of the minds." *Big Apple BMW, Inc. v. BMW of N. Am. Inc.*, 974 F.2d 1358, 1364 (3d Cir. 1992) (quoting *Edward J. Sweeny & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980)). "[C]oncerted action may be inferred from circumstantial evidence. That evidence should be analyzed as a whole, rather than compartmentalized, to determine whether it supports an inference of concerted action." *Big Apple BMW*, 974 F.2d at 1364 (citing *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698 (1962)).

In evaluating a record for purposes of deciding a summary judgment motion, "it is inappropriate for a court to resolve factual disputes and to make credibility determinations. . . . Inferences should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." *Big Apply BMW*, 974 F.2d at 1363 (citing *County Floors, Inc. v. A Partnership Composed of Gepner and Ford*, 930 F.2d 1056, 1061 (3d Cir. 1991)).

> To raise a genuine issue of material fact, . . . , the opponent need not match, item for item, each piece of evidence proffered by the movant. In practical terms, if the opponent has exceeded the 'mere scintilla' threshold and has offered a genuine issue of material fact, then the court cannot credit the movant's version of events against the opponent, even if the quantity of the movant's evidence far

> outweighs that of its opponent. It thus remains the province of the factfinder to ascertain the believability and weight of the evidence.

Big Apple BMW, 974 F.2d at 1363.

As the majority at least implicitly recognizes, there is evidence present in the record in this case that supports appellants' claims. *See* majority opinion at 8-16 [typescript at 10-21]. As I will explain, I believe that this evidence, taken as a whole, exceeds a "mere scintilla" threshold. I fear that the majority has crossed the delicate line between the inference drawing proper for summary judgment analysis and the substantive evaluation of evidence that must be left to a jury.

In reviewing the evidence, we must also keep in mind that the NDPA has been campaigning for years against the 800 number dealers. The NDPA was previously prosecuted by the FTC for exactly the activity complained of here, attempting to drive 800 number dealers out of the wallcovering business. *See* app. at 412; majority opinion at 10-12 [typescript at 12-14]. I find that this history is significant to an evaluation of the evidence present in the record. It is uncontested that the NDPA is both highly sophisticated and possesses significant market power. It is unrealistic to think that such a sophisticated trade association, wary of the antitrust laws, would produce the same kinds of damaging evidence as would a less artful group.

I.

Turning first to Count I, the claim of a horizontal conspiracy between the individual retail wallcovering dealers, acting through the NDPA, I believe that the majority has misapplied relevant precedent to its consideration of an intellectually challenging issue of first impression in this

Court.[1] The threshold legal question that must be answered is: Can the actions and statements of an agent of trade association, if that agent is cloaked with the apparent authority to act on behalf of the association, serve to hold the trade association liable as a "combination" under section 1 of the Sherman Act. The majority has answered this question in the negative unless a court finds either that a co-conspirator exists or that "the actions in question represent an attempt by the association, rather than the actor, to restrain trade[]" so that section 1 liability cannot be imposed on the NDPA absent "some indication that two or more members of NDPA were utilizing it as a vehicle for concerted anticompetitive action." Majority opinion at 22 [typescript at 29]. In arriving at this conclusion, however, the majority misconstrues the concept of apparent authority to arrive at a result which is inconsistent both with relevant Supreme Court precedent and with the dictates of logic.

Let me begin by discussing the basics of "apparent authority." The issue of apparent authority arises when there is a question of the existence or of the scope of the agency. If it is clear that the principal itself is acting or that the principal has expressly authorized the action of the agent, the question of "apparent authority" never surfaces. The issue in the present case is whether the officers of the NDPA were authorized to make certain statements on behalf of the association. If these officers had the express authorization of the association, we would not need to determine whether they were speaking with its "apparent authority." We get to this question only when the situation is more clouded.

As a general rule, apparent authority may be created by any conduct, or acquiescence in conduct, by the principal which causes a third person to believe that the principal

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1 Neither the parties, the majority, nor my own research has uncovered any case that has dealt with the specific issue involved here.

consents to the actions or statements of the person who is allegedly acting for the principal. *See Restatement (Second) of Agency* § 27 (1984) ("apparent authority to do an act may be created by written or spoken words or any conduct of the principal which, reasonably interpreted, causes a third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.") *Cf. NLRB v. L & J Equipment Co., Inc.*, 745 F.2d 224, 232-235 (3d Cir. 1984) (discussing "apparent agency" in considering whether certain actions and statements of in-house organizing committee members during labor union representation election were done as agents of the union).

This issue of the apparent authority of the NDPA officers to speak on behalf of the association is one which I conclude, on the basis of the facts of record which I will discuss later, should go to the jury.

With apparent authority in mind, I will return to plaintiffs' allegations in Count I, the horizontal conspiracy. "In order to establish a violation of section 1 of the Sherman Act . . ., a plaintiff must establish three elements: (1) a contract, combination, or conspiracy; (2) restraint of trade; and (3) an effect on interstate commerce." *Weiss v. York Hosp.*, 745 F.2d 786, 812 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985). The issue here is whether the actions of a trade association's agent can create liability on the part of the trade association as a section 1 "combination." A proper analysis of the requirements for a section 1 "combination" focuses not upon concepts such as official authorization of action but upon "the economic substance of . . . [an] arrangement." *Weiss*, 745 F.2d at 815. In *Weiss*, this Court found that a hospital's medical staff was a section 1 combination because "each staff member . . . has an economic interest separate from and in many cases in competition with the interests of the other medical staff members." *Id.* Additionally, the Court found the medical staff similar to the Associated Press and the New York Stock Exchange, "a combination of otherwise competing entities,"

which the Supreme Court has previously found to be section 1 combinations. *Id.* (citing *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); *Associated Press v. United States*, 326 U.S. 1 (1945)).

The NDPA is similarly a combination of otherwise competing entities. A trade association is a group of competitors who unite for a common purpose and is a unit of joint action sufficient to constitute a section 1 combination. *See* G.D. Webster, The Law of Associations § 9a.01[1], 9A3-4 (1991) ("There is no question that an association is a 'combination' within the meaning of Section 1 of the Sherman Act. Although a conspiracy requires more than one person, an association, by its very nature a group, satisfies the requirement of joint action. Thus, any association activity which restrains interstate commerce can be violative of Section 1 even if no one acts in concert with the association."); Stephanie W. Kanwit, FTC *Enforcement Efforts Involving Trade and Professional Associations*, 46 Antitrust L.J. 640, 640 (1977) ("Because trade associations are, by definition, organizations of competitors, they automatically satisfy the combination requirements of § 1 of the Sherman Act."). Indeed, NDPA's summary of the FTC consent order notes that anticompetitive activities will violate the "antitrust laws," and explains that "[a]n agreement between one or more competitors is necessary for the law or the consent order to be violated, but remember that: 1 NDPA is a *group* of competitors and is therefore already considered to be an 'agreement.'" App. at 429-40. This statement indicates both that NDPA believed that it was a section 1 combination with group status and power and that it conveyed that impression to the wallcovering industry.

I conclude that NDPA's status as a section 1 combination does not change when it acts through its agents cloaked with apparent authority. I believe that this conclusion is compelled by the Supreme Court's opinion in *American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 570-71

(1982), where the Court held a trade association liable under section 1 of the Sherman Act for the statements of a subcommittee chairman. The Court stated that "[w]hen it cloaks its subcommittee officials with the authority of its reputation, ASME permits those agents to affect the destinies of businesses and thus gives them the power to frustrate competition in the marketplace." *Id.* The response at issue was merely an "'unofficial' response authored by a single ASME subcommittee chairman. Yet the force of ASME's reputation is so great that M & M was able to use that one 'unofficial' response to injure seriously the business of a competitor." *Id.* at 971.

As the majority emphasizes, in *Hydrolevel* ASME was found liable as a co-conspirator rather than as a combination. I find this factual distinction with the present case of little relevance. The Supreme Court's analysis in *Hydrolevel* was neither explicitly nor implicitly limited to situations where a trade association was one of many co-conspirators. Instead, it was grounded upon the economic power that a trade association may possess. *See* 456 U.S. at 570-71. The Court reasoned:

> Only ASME can take systematic steps to make improper conduct on the part of all its agents unlikely, and the possibility of civil liability will inevitably be a powerful incentive for ASME to take those steps. Thus, a rule that imposes liability on the . . . [trade association] — which is best situated to prevent antitrust violations through abuse of its reputation — is most faithful to the congressional intent that the private right of action deter antitrust violations.

Id. at 572-73. Indeed, the Supreme Court has explained that it is the economic power of concerted action that requires section 1 antitrust scrutiny. "Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking

that competition assumes and demands." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768-69 (1984); *see also* Terrence C. Sheehy & William J. Hunter Jr., *Antitrust Principles Applicable to Trade Association Activities*, 362 PLA/Comm 19 (1985) ("[A] trade association may be found liable for treble damages based upon the activities of its members, when they act with the apparent authority of the association. . . . It is not necessary that co-conspirators be named parties.")[2]

The majority relies upon *Nanavati v. Burdette-Tomlin Memorial Hosp.*, 857 F.2d 96 (3d Cir. 1988), to support its position that the actions of a trade association's agent cloaked with apparent authority can render the trade association liable only if there has been some group decision by members of the association to pursue anticompetitive activity. Such reliance is misplaced. In *Nanavati* there was no allegation of group or concerted action by the hospital's Executive Committee in connection with the allegations of a boycott of the referral of patients to Dr. Nanavati. *See* 857 F.2d at 119. We held that the Executive Committee could not be considered a combination because it did not act as a

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2 One commentator has argued that the Court's decision in *Hydrolevel* is properly characterized as a metaphor for protecting due process. When a trade association, a group that functions privately to regulate an industry, has power substantially to affect its market, actions of its agents that tend to exclude and harm competitors essentially deprive those competitors of any rights to fair representation in industry regulation. *See* Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 Geo. L.J. 395, 417-18 (1986) ("The failure of a powerful trade association or other organization to protect competitors should be remedied, by analogy to representation in government, by giving those excluded a right to participate in the group or, in the alternative, a right fairly to be represented by those in charge of the group."). The application of such a due process metaphor to the present case suggests that the actions of NDPA's officers and officials may be aimed at improperly ostracizing and excluding 800 number dealers from decisions that will control the wallcovering industry. Because of this capacity of a trade association to impose exclusionary standards on engaging in a particular business or industry, it is perhaps more critical, when there has been a showing that attempted regulation by the association may have this propensity to eliminate non-participating competitors, that the court permit a full consideration of those allegations by the finder of fact.

body with regard to the boycott. "Instead of group action by the Executive Committee, *Nanavati* points to the actions and motivations of medical staff members who were not on the Committee." *See id.*

There is no inconsistency between *Nanavati* and a proper application of *Hydrolevel* to the present case. Here, group action on the part of NDPA has been alleged. The "individuals" whose actions are under scrutiny are officials of NDPA who are allegedly cloaked with apparent authority. Just as the actions of ASME's subcommittee chairman could hold that association liable under section 1 of the Sherman Act, the statements and actions of NDPA's officers and agents can hold it similarly liable. The appropriate analog to the present case in *Nanavati* would have been an allegation that an Executive Committee officer cloaked with plaintiff. In such a situation, as in the present case, sufficient allegations of "group action" would exist to find a section 1 combination.

The majority's conclusion that an association could be liable for the actions of its agents cloaked with apparent authority only if "the actions in question represent an attempt by the association, rather than the actor, to restrain trade" would eviscerate the doctrine of apparent authority delineated in *Hydrolevel*. The point of *Hydrolevel* is that actions of an association's agent, cloaked with apparent authority, *are* actions of the association. Indeed, the majority's interpretation is contradicted by the conclusion in *Hydrolevel* that there need be no ratification of the actions of an association's agents for it to be held liable. "[A] ratification rule would have anticompetitive effects, directly contrary to the proposes of the antitrust laws. ASME could avoid liability by ensuring that it remained ignorant of its agent's conduct, and the antitrust laws would therefore encourage ASME to do as little as possible to oversee its agents." *Hydrolevel*, 456 U.S. at 573-574. As long as the association has clothed the agent with apparent authority to act on its behalf, it is liable for the anticompetitive actions

taken by that agent. Moreover, acquiescence by the association in one of its officers acting as its spokesman can be a confirmation of apparent authority. *See Restatement (Second) of Agency* § 27 (1984).

An examination of the evidence present in the record demonstrates that there is sufficient evidence to submit this case to a jury for a determination whether NDPA's agents were cloaked with the apparent authority to act on behalf of the association and whether they engaged in anticompetitive activity. Particularly relevant is the speech given by NDPA president John Wells at a trade show. According to reports of this speech in *Decorating Retailer* and the *Wallcovering Industry News*, this speech was characterized as "Retailer Spokesman Urges Supplier Support," App. at 440, and included statements to solve the "piracy problem" by "urging retailers to say 'No' to some collections and suppliers." App. at 167, 440. Regardless of Well's insistence that he had stated that he was speaking in his individual rather than official capacity, *see* app. at 183-84, the fact that those whose heard him and who reported on what he said characterized his remarks in NDPA's publications as those of the "retailer spokesman" may persuade a jury to find that he was speaking in his official capacity with the acquiescence of the NDPA.

Furthermore, there is evidence of conversations between NDPA Chief Executive Officer Robert Petit and other NDPA officers and wallcovering manufacturers allegedly to urge that the manufacturers take steps to eliminate the 800 number dealers. *See* app. at 185, 190-98, 201-207, 212-229, 407, 416-419, 693-99, 700. One such conversation occurred between Petit and John Fitzgerald, president of Collins and Aikman, parent corporation of manufacturer Kinney Wallcoverings. In a memorandum recording this meeting, Petit stated that he told Fitzgerald of the "anger felt by the retailers in lack of support from the wallcovering industry" and "that the piracy issue seems to have intensified." App. at 185. In response, "Fitzgerald indicated that he recognized

the problems the retailer faces and wanted to know what I felt would be the chances of success if they in effect started a new company and actually franchised dealers to handle two or three lines. These lines would be guaranteed not to be available to 800 number operators or to chains." *Id.* Petit added that "I think it's a very important step forward and told them we would like to cooperate where possible. If [Kinney] does something of this nature, it could break the logjam that now exists in regard to piracy." *Id.* Petit admitted that he made similar statements to other manufacturers including FSC. *See* app. at 204. Again, considering the implications of this conversation, in view of Petit's position as CEO of the NDPA, the question of whether Petit was speaking with the authority or the apparent authority of the NDPA should be considered by the jury, and not dismissed by the judge.

Finally, the evidence of other speeches, numerous letters, and editorials in *Decorating Retailer* add to the reservoir of evidence of anticompetitive activity from which a jury could draw. I conclude that on the whole there is sufficient evidence to survive summary judgment because, viewed in a light favorable to plaintiffs, this evidence creates a material issue of fact whether NDPA officials, cloaked with apparent authority to act on behalf of the association, engaged in anticompetitive activity.[3] I would reverse the district court's disposition of Count I and remand for trial.

II.

Turning now to Count II, I conclude that there is enough evidence of a conspiracy between NDPA and FSC to go to a

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[3] I also note that, as will be discussed in my analysis of Count II, there is evidence of a conspiracy between the NDPA and FSC. *See infra* at 50-52 [tyescript at 18-20]. This evidence provides a basis for characterizing FSC as a co-conspirator of the NDPA sufficient to survive summary judgment on Count I, even under the majority's analysis of section 1 combination liability.

jury in light of my determination in Part I that there is sufficient evidence to go to a jury regarding NDPA's alleged anticompetitive activities. Generally, in order to survive summary judgment on a vertical conspiracy claim, the non-movant must produce evidence which "tends to exclude the possibility that the manufacturer and [involved] distributors were acting independently." *Monsanto*, 465 U.S. at 764. When dealer complaints are introduced as such evidence, "an antitrust plaintiff must be prepared to demonstrate a causal relationship between alleged dealer complaints and a distributor's action in order to show that the concerted action in violation of the Sherman Act is distinguishable from 'perfectly legitimate' independent conduct." *Big Apple BMW*, 974 F.2d at 1364. This causal relationship appears to require evidence that supplements dealer complaints. "Complaints by competitors, standing alone, are not sufficient to show a conspiracy." *Monsanto*, 465 U.S. at 764.

The present case, however, does not represent a garden variety vertical conspiracy case. Rather, it involves allegations of a hybrid horizontal/vertical conspiracy where a manufacturer entered the scheme only as a result of substantial dealer coercion to do so. In *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988), the Court appeared to say that vertical restraints forced by a horizontal conspiracy which involves manufacturers coerced by retailers is really a horizontal antitrust violation and should be treated as a horizontal conspiracy. The Court interpreted Judge Bork's antitrust treatise as follows: "[Bork says] that a facially vertical restraint imposed by a manufacturer only because it has been coerced by a "horizontal cart[l]' agreement among his distributors is in reality a horizontal restraint. That says precisely what we say: that a restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement." 485 U.S. at 730 n.4 (interpreting Robert Bork, The Antitrust Paradox 288 (1978)). Judge Bork emphasized that such a scheme includes restraints which are "vertical in form only." Bork at 288.

The implication of treating the conspiracy alleged in this case as such a hybrid is that the assumptions underlying *Monsanto's* requirements for evidence that excludes the possibility of independent manufacturer action apply with much less force. The case contains allegations that the manufacture's decision process has been tainted by coercion. Indeed, the principles grounding post-*Monsanto* antitrust theory and jurisprudence demonstrate that it is evidence of dealer coercion of a manufacturer or of the pretextual nature of a manufacturer's purported justification for imposing a vertical restraint which tends to show that the vertical restraint violates the antitrust laws. *See* Jean Wegman Burns, *Rethinking the "Agreement" Element in Vertical Antitrust Restraints*, 51 Ohio St. L.J. 1, 31-32 (1990); Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 Antitrust L.J. 135 (1984).

Normally, vertical restraints may enhance interbrand competition and provide consumers with the optimal level of dealer services. *See Business Electronics*, 485 U.S. at 724-25; Easterbrook, 53 Antitrust L.J. at 135. Indeed, elimination of "free riders" may create long-run efficiencies by protecting the viability of dealers who provide the efficient level of services. *See Business Electronics*, 485 U.S. at 725; Burns, 51 Ohio St. L.J. at 12-14. However a retailers' scheme to coerce manufacturers into imposing vertical restraints is more likely to eliminate competition from discounters who tend to drive the prices of goods down to an efficient equilibrium. For example, in the personal computer market, computers originally were sold only by showroom retailers. Eventually, 800 number discounters entered the market and drove prices substantially down. At present, the market contains both showroom retailers and 800 number discounters. But the price gap between them is much smaller than when 800 number discounters first entered the market. Previously the gap often exceeded $1000 per computer. Now, that gap is often as small as $100 per computer. The *Monsanto* theory of efficient service level was

validated in the personal computer market; but the price of those services dropped to a long-term efficient equilibrium only because of the presence of "free riders" who drove the price of those services down from an inefficiently high level. *See, eg.*, Stewart Alsop, *Bewitched, Bedraggled: PC Industry Dances to Customers' Beat*, InfoWord, July 5, 1993, at 4; Stratford Sherman, *How to Prosper in the Value Decade*, Fortune, November 30, 1992, at 90; Peter Burrows & Stephanie Anderson Forest, *Dell Computer Goes into the Shop*, Business Week, July 12, 1993, at 138. The wisdom that has undergirded our traditional antitrust jurisprudence also carries forward to the present.

> The protection of price competition from conspirational restraint is an object of special solicitude under the antitrust laws. We cannot respect that solicitude by closing our eyes to the effect upon price competition of the removal from the market, by combination or conspiracy, of a class of traders. Nor do we propose to construe the Sherman Act to prohibit conspiracies to fix prices at which competitors may sell, but to allow conspiracies or combinations, to put competitors out of business entirely.

United States v. General Motors, 384 U.S. 127, 148 (1966).

In the present case, I believe that there is evidence both of dealer coercion and of pretext sufficient to present Count II to a jury. Plaintiffs allege a hybrid horizontal/vertical conspiracy that involves dealer coercion. Petit's activities regarding Fitzgerald, *see* app. at 185-86, and Landau of FSC, *see* app. at 304, 309 indicate that NDPA was pressuring FSC and other manufacturers to adopt measures to restrain 800 number dealers. The *Decorating Retailer*, through both editorials and letters to the editor, was also used as a mechanism to pressure manufacturers. As members of the wallcovering industry who received this publication, FSC and other manufacturers must have known about the strong

anti-800 number dealer sentiments by the trade association of retailers that included implicit threats to boycott uncooperative manufacturers support plaintiffs' claim.

Furthermore, I find that there is evidence of pretext present in the record. First, the two FSC press releases demonstrate that FSC was concerned about eliminating its references to "sales piracy" and its linkage to its drop shipment surcharge. *See app.* at 289-99, 486. The majority explains away the possibility that this evidence demonstrates FSC's complicity in an anticompetitive conspiracy: "That FSC felt a need to use more genteel language when explaining to the public what it could internally refer to as efforts to combat 'piracy' does not imply a sinister motive." Majority opinion at 29-30 [typescript at 41]. I believe that the proper body to make such determinations about the implications of FSC's "genteel language" is a jury. I find it difficult to believe that no reasonable jury could find that the changes from the draft to the final press release constitute evidence of pretext.

Second, I find that FSC's failure to engage in any economic or mathematical analysis regarding its surcharge provides additional evidence of pretext. Again the majority explains this away: "A lack of market research, while perhaps adding luster to plaintiff's contention that the surcharge was arbitrarily determined, does not necessarily invite an inference that FSC's statement was an attempt to conceal a conspiracy." Maybe so; but I believe it could invite such an inference. Since we must draw all possible inferences in the non-movant's favor, I find that this issue also is capable of resolution only by a jury. I would reverse the district court's disposition of Count II and remand for trial.

In summation, I conclude that counts I and II are inextricably linked. The anticompetitive activity alleged in the present case properly may be characterized as an effort by the NDPA, acting through its officers, to coerce

manufacturers such as FSC into adopting restraints upon 800 number wallcovering dealers. In essence, plaintiffs have alleged a "horizontal" conspiracy involving both the NDPA and FSC. Even under the majority's analysis of section 1 combination liability, the evidence of FSC's complicity in NDPA's campaign against 800 number deales should prove sufficient for Count 1 to survive summary jdugment. Similarly, the majority's conclusion that FSC's actions are as likely to be the result of indepenent action as of an illicit conspiracy is undercut when one accounts for the evidence that NDPA's officers actively solicited manufacturer restraints upon 800 number dealers. Both Counts I and II should be resolved by a jury.

A True Copy:
Teste:
Clerk of the United States Court of Appeals for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALVORD-POLK, INC., et al.,	:	
	:	
Plaintiffs	:	CIVIL ACTION
	:	
v.	:	NO. 90-3617
	:	
F. SCHUMACHER & CO. and THE NATIONAL DECORATING PRODUCTS ASSOCIATION, INC.,	:	
	:	
Defendants	:	

MEMORANDUM & ORDER

HUYETT, J. March 13, 1992

Plaintiffs have brought suit against defendants F. Schumacher & Co. and The National Decorating Products Association, Inc. alleging violations of Section 1 of the Sherman Antitrust Act, violations of the Pennsylvania antitrust laws, and various common law causes of action. Defendants have moved for summary judgment on all counts except Count V. Plaintiffs oppose the motions for summary judgment. Defendant F. Schumacher & Co. has brought counterclaims against certain of the Plaintiffs. These Plaintiffs have moved for summary judgment on Counts I through XI of the counterclaims. F. Schumacher & Co. opposes the motion. Finally, F. Schumacher & Co. has moved for summary judgment of Counts XII and XIII of the counterclaim. Plaintiffs do not oppose this motion.

For the reasons discussed below, the Court will grant Defendants' motions and partial summary judgment will be granted on all claims stated in the Amended Complaint, except Count V. Also, the Court will grant Plaintiffs' motion

for partial summary judgment on counterclaim Counts I, II, III, V, VI, and VIII through XI. Counts IV and VII of the counterclaim remain. Finally, the Court will grant F. Schumacher & Co.'s motion for partial summary judgment on counterclaim Counts XII and XIII.

(I)

The plaintiffs in this action are ten wallpaper dealers that sell wallpaper to customers through the use of 800 number telephone numbers. Plaintiffs attract their customers primarily by advertising in national magazines. *See, e.g.*, Plaintiffs Ex. 13, Heap Tr. 611-12. Defendant F.Schumacher & Co. ("FSC") has been in the business of designing, manufacturing, and selling fine home furnishing products for over one hundred years. FSC Ex., Puschel Tr. 11, 77-78. Defendant The National Decorating Products Association, Inc. ("NDPA") is a non-profit corporation whose membership is comprised primarily of independent decorating product retailers offering paint, floor coverings, carpet, wallcoverings, and window treatments for sale to consumers. Petit Aff., para. 3; Worley Aff., para. 3. NDPA's membership consists of approximately 75% of the independent products retailers in the nation. Plaintiffs Ex. 17.

NDPA is managed by an eighteen member Board of Directors composed of the President, Vice President, Treasurer, three immediate past presidents, and twelve Regional Directors. Petit Aff., para. 5, Attachment A at 7. The business and policy of NDPA is established and managed solely thought the actions of the Board. *Id.* The President and the Chief Executive Officer work under the direction of the Board and are responsible for implementing the measures adopted by the Board. *Id.* Neither the NPPA's constitution nor its by-laws authorize any individual or speak on behalf of NDPA on matters of business or policy. *Id.* NDPA sponsors trade shows, educational seminars, and workshops for the benefit of its members. *Id.* at paragraph 4.

NDPA also publishes a monthly journal entitled *Decorating Retailer* which includes, among other things, letters to the editor and an editorial column entitled "Perspectives." Capuano Aff., para. 2, 3, 4, 7. According to NDPA, the letters to the editor are clearly stated to be the opinion of the writers and not of the editor. *Id.* Also, NDPA claims that the editor of *Decorating Retailer* has unfettered discretion to determine what is published in the magazine, and that the magazine is run independently from the day-to-day operations of NDPA. *Id. Wallcovering Industry News* was another NDPA publication that was printed until January, 1991. *Id.* at para. 2.

Wallcoverings have traditionally been distributed to consumers through independent retailers who provide showrooms and sales personnel to assist consumers in making their wallpaper selections. FSC Ex. 19, Shebar Tr. 64-68. Showroom retailers display numerous catalogues that they have purchased from manufacturers or distributors. *Id.;* FSC Ex. 3, Chevallier Tr. 96; FSC Ex. 16, Puschel Tr. 163-4. These catalogues contain samples of patterns and products that are available from the manufacturers. *Id.* The training costs and compensation for sales personnel, the catalogues, and the display space are items of capital investment by the retailers for which they seek a return. *Id.* In the interest of marketing its products, FSC encourages its dealers to make a substantial investment in sample books, point of purchase displays, and creating a environment helpful to the consumer. *Id.*

Plaintiffs generally sell to their customers at discounted prices. Plaintiffs Ex. 15, Seabrook Tr. 88. A customer can place an order with an 800 number dealer merely by informing the telephone operator of the brand and pattern code of the wallcovering products the customer wishes to buy. Plaintiffs Ex. 14, Katzman Tr. 196. The 800 number dealer then orders the wallpaper from the manufacturer and arranges to have the wallpaper shipped to the customer. *Id.;* Plaintiffs Ex. 15, Seabrook Tr. 88. Consumers who order wallcoverings from Plaintiffs and

other 800 number dealers have not visited the 800 number dealers' showrooms. FSC Ex. 1, Boyer Tr. 59-61; Ex. 6, Heap Tr. 170-172, 379-80, 608; Ex. 10, Lando Tr. 36-38, 67-69. Instead, the customer who purchases from the 800 number dealer has made his or her selection by looking at the sample books displayed by a showroom retailer, noting the product numbers, and then calling the 800 number dealer. FSC Ex. 10, Lando Tr. 37-38, 65-67; Ex. 1, Boyer Tr. 59-60; Ex. 7, Katzman Tr. 187, 267; Ex. 14, Nicozisis Tr. 343-344. As a result of this activity, the showroom retailers have experience a loss of sales to the 800 number operators, and this loss of sales has resulted in complaints from showroom retailers appearing in industry publications and complaints to FSC about the 800 numbers dealers' practices. FSC Ex. 16, Puschel Tr. 66-67; Ex. 9, Landau Tr. 258-259, 318.

Showroom retailers began voicing their displeasure with 800 numbers dealers at least as early as 1983. Plaintiffs Exhibit 56. The NDPA became involved in advocating the adoption of coded sample books (so-called "anti-piracy kits"). Plaintiffs Ex. 6, Petit Tr. 135-7. As a result of these activities, the Federal Trade Commission ("FTC") filed a complaint against NDPA and others on April 29, 1985. *See* Plaintiffs Ex. 17, 21. In June, 1986, the parties settled this action and the FTC issued a decision and order. NDPA Ex. 2. NDPA denied any violations of law and, under the terms of the Order, agreed to refrain from various antitrust activities. Plaintiffs Ex. 20. Thereafter, NDPA filed a report of compliance with the FTC in August, 1986, provided each NDPA member with a copy of the FTC Order, published the Order in the September, 1986 edition of *Decorating Retailer*, and sent each member a letter advising them to read and comply with the FTC Order. Petit Aff., para. 8. In October, 1986, NDPA reported to the FTC that it was in compliance with the Order, and in April, 1987, the FTC informed NDPA that it was in compliance. *Id.*, para. 9. In June, 1988, NDPA filed a supplemental report of compliance and the FTC again notified NDPA that it was in compliance with the Order. *Id.* Starting in 1988, Michael S. Lando,

president of Plaintiff Fairman Wallpaper and Paint Company, sent eight written communications to the FTC containing allegations similar to the ones in this action, complaining that NDPA had violated the FTC Order, and asking the FTC to take action against NDPA. NDPA Ex. 3. The FTC has made no response except to notify NDPA that it is in compliance with the Order. Petit Aff. para. 9, 10; Petit Tr. 282.

As Plaintiffs point out in their response through examples from the record, showroom retailers continued to express their displeasure with 800 number dealers' practices. Plaintiffs Response, pages 11-12. FSC was aware of the showroom dealers' sentiments. FSC Ex. 16, Puschel Tr. 66-67. On July 31, 1988, FSC announced that it would charge a drop shipment surcharge of seven percent to encourage dealers to sell within their local trading area. FSC Ex. 9, Landau Tr. 25-26, 33, 282-284; Plaintiffs Ex. 8. This policy was not entirely successful and FSC therefore decided to adopt a local trading area policy that would prohibit the solicitation and sale of FSC wallcoverings outside a dealer's local trading area. FSC Ex. 16, Puschel Tr. 115, 119-121; Landau Transcript 181-182.

FSC states that it adopted these policies in an effort to encourage dealers to continue to invest in sample books, and to ensure that dealers make a return on their investment in the books. FSC Ex. 3, Chevallier Tr. 95-97. FSC states that these policies would help it build its business. FSC Ex. 9, Landau Tr. 283-285. Finally, FSC states that it adopted a policy of collecting state sales tax on drop shipments on the advise of the accounting firm of Peat Marwick. FSC Ex. 12, Meth Tr. 39-041; Meth Dep. Ex. 5. As will be discussed more fully below, Plaintiffs claim that these policies were adopted as part of a conspiracy in restrain of trade in violation of the Sherman Act.

(II)

In order to establish a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the plaintiff must establish three elements: (1) a contract, combination, or conspiracy; (2) restrain of trade; and (3) an effect on interstate commerce. *Weiss v. York Hospital*, 745 F.2d 786, 812 (3rd Cir. 1984). Generally, if the foregoing elements are proved, the activity complained of will be judged according to "the rule of reason." *De Filippo v. Ford Motor Co.*, 516 F.2d 1313, 1317 (3d Cir. 1975). However, the Supreme Court has ruled that certain activity is so harmful to interstate commerce that it is *per se* unreasonable and therefore in violation of the Sherman Act. *Id.* Activity known as "group boycotts' fall within this *per se* category and are held to be in violation of the Act. *Id.* A group boycott is a concerted refusal by traders to deal with other traders. *Id.*

At the heart of Plaintiffs' complaint is the allegatio that NDPA members conspired to threaten a group boycott against FSC, and that FSC caved into this pressure and joined the conspiracy by adopting measure harmful to Plaintiffs. Since there are no circumstances under which group boycott activity can be reasonable, and therefore not in violation of the act, the central issue in this case is whether Plaintiffs have presented sufficient evidence of a conspiracy among the NDPA membership and between the NDPA membership and FSC. While the exact elements Plaintiffs need to prove differ as to each count, the central issue in each is the existence of conspiracy. In Count I, Plaintiffs must show evidence that the various NDPA members and the NDPA conspired to engage in a group boycott. In Count II, Plaintiffs must show evidence that FSC adopted the measures complained of because it had joined the retailers' conspiracy rather than adopting the measures independently. Finally, to prove Count III, Plaintiffs must show evidence that FSC engaged in a horizontal conspiracy with other manufacturers in the industry.

In appropriate circumstances, the Court may enter summary judgment pursuant to Federal Rule of Civil Procedure 56. In general, a court may grant summary judgment if it finds an absence of genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1985). The moving party has the initial burden of showing the absence of genuine issues of fact. *Id.* at 322. Once this showing is made, the non-moving party has the burden of going beyond the pleadings to show the existence of a genuine issue of material fact. *Id.*

In the antitrust conspiracy context, the Supreme Court has developed specific burdens that a plaintiff must satisfy in order to overcome a motion for summary judgment. *See generally Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 474 U.S. 574 (1985); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1983). To survive a motion for summary judgment, the non-movant plaintiff must establish that there is a genuine issue of material fact as to whether the defendants entered into an illegal conspiracy that caused the plaintiff to suffer a cognizable injury. *Matsushita*, 475 U.S. at 586. This showing has two components. First, the plaintiff must show more than an antitrust conspiracy; the plaintiffs must show an injury resulting from the illegal conduct. *Id.* Second, the issue of fact must be genuine. *Id.*

To show that the issue of fact is genuine, the plaintiff must show more than some metaphysical doubt. *Id.* If the factual context renders the plaintiff's claims implausible (i.e. they make no economic sense), then the plaintiff must come forward with more persuasive evidence than would otherwise be necessary. *Id.* at 587. The antitrust laws limit the range of permissible inferences that the Court may draw from ambiguous evidence. *Id.* at 588. Conduct which is as consistent with permissible activity as with an illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. *Matsushita*, 475 U.S. at 588.

> To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. Respondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents.

Id. (citations omitted).

(III)

Plaintiffs' principal claim against defendants is violation of Section 1 of the Sherman Act, and the central issue in evaluating this claim is whether Plaintiffs have put forward enough evidence of conspiracy to satisfy the summary judgment standard set forth in *Matsushita*. The elements that make up an actionable antitrust conspiracy differ with each count, so the Court will examine each in turn. Plaintiffs have also brought suit under the Pennsylvania antitrust laws. The state antitrust laws largely follow the federal antitrust laws. Therefore, the resolution of the federal counts will also act to resolve the state counts.

A. Group Boycott - Count I

Concerted activity constitutes a "group boycott" and is considered a *per se* violation when there is a purpose either to exclude a person or group from the market, or to accomplish some other anti-competitive objective, or both. *De Filippo v. Ford Motor Company*, 516 F.2d 1313, 1318 (3rd Cir. 1975). In Count I of the complaint, Plaintiffs assert that the individual retail wallcovering dealers, acting through the NDPA, entered into a conspiracy in restraint of trade. Amended Complaint, para. 70. From Plaintiffs' brief in

opposition to Defendants' motion for summary judgment, it is clear that Plaintiffs are arguing that NDPA entered into a group boycott designed to convince FSC not to trade with 800 Number dealers. NDPA does not challenge the "group boycott" characterization. Rather, it argues that Plaintiffs have presented no genuine issue of material fact to support their claims of conspiracy and cite evidence in the record to that effect. NDPA Memorandum, pages 13-14; *see, e.g.*, NDPA Ex. Petit Tr. 288-292, 300; Petit Aff. para. 11-18, 21-22, 24-25; Cornetta Aff. para. 6-23; Bergman Aff. para. 6-23; Wells Tr. 82-89; Wells Aff. para. 6-23. To prove conspiracy, Plaintiffs must show evidence sufficient to warrant a jury finding that the alleged co-conspirators had a unity of purpose, a common design and understanding, or a meeting of the minds in an unlawful arrangement. *United States v. Continental Group, Inc.*, 456 F. Supp. 704, 715 (E.D.Pa. 1978), *aff'd*, 603 F.2d 444 (3d Cir. 1979). Conspiracy can be proved by circumstantial as well as direct evidence. *Id.*

Before looking at the specific evidence, Plaintiffs first argue that the NDPA, as an entity, is itself a combination under Section 1. In support of this argument, Plaintiffs rely heavily on *Weiss v. York Hospital*, 745 F.2d 786 (3rd Cir. 1984). Plaintiffs' Memorandum, page 26. The Third Circuit returned to the issues explored in *Weiss* in *Nanavati v. Burdette Tomlin Memorial Hospital*, 857 F.2d 96 (3rd Cir. 1988) and put a gloss on *Weiss*. The *Weiss* court has held that a hospital's executive committee made-up of doctors who practiced at the hospital, was liable under the antitrust act because they were a Section 1 "combination." The court reached this conclusion because the Committee was made up of doctors who had competing economic interests and who had acted as a group when they voted to deny the plaintiff the right to practice at the hospital. In *Nanavati*, the executive committee in question was a Section 1 combination, but is took no group action. Rather, an independent member of the group took action. Plaintiffs reliance on *Weiss* is mistaken because there is no evidence in this case of officially sanctioned NDPA activity. The NDPA

can only act pursuant to a resolution from its board and no such resolution has been identified. Plaintiffs also argue, however, that an association can be held liable of the acts in violation of the antitrust laws of officers cloaked with apparent authority. In support of this proposition, Plaintiffs cite *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1981). Plaintiffs are correct and therefore the Court must examine Plaintiffs specific evidence of conspiracy.

In support of their motions for and against summary judgment, both Defendants and Plaintiffs have developed an impressive record (almost 200 exhibits). Despite the volume of this information, Plaintiffs point to a relatively few pieces of ambiguous evidence to support their claims. After a close examination of this material in light of the summary judgment standard in *Matsushita*, the Court must conclude that Plaintiffs have failed to put forward any direct evidence of conspiracy despite their assertions to the contrary. Plaintiffs have put forward a great deal of information they claim is circumstantial evidence supporting the inference of conspiracy, however, upon examination of this evidence, the Court concludes that Plaintiffs have failed to satisfy the summary judgment burden detailed above.

At pages two through four of their motion, Plaintiffs list nine pieces of evidence that they claim are direct evidence of a conspiracy among the parties. Plaintiffs Ex. 1; Ex. 2 at 117-118, 161-162; Ex. 3; Ex. 4 at 16-180; Ex. 5, 8, 10, 12. The Court has examined each. Whatever this evidence may show, it certainly is not direct evidence of conspiracy. At best, when examined in context, these examples are ambiguous circumstantial evidence of conspiracy. The first, identified as Plaintiffs' Exhibit 1 and Plaintiffs' Exhibit 2, Landau Transcript at 72-77, is a May, 1990 article about a speech given by NDPA chief executive officer Roger Petit. Upon examination, it becomes clear that this speech gave *post hoc* approval to the actions of manufacturers who had adopted bar coding measures. Likewise, item two, identified as Plaintiffs' Exhibits 1, 3, and 27 is also an

example of *post hoc* approval for actions already taken by manufacturers. In a similar vein, the other seven examples provide ambiguous statements that might be circumstantial evidence of conspiracy. They do not present "direct" evidence of conspiracy.

Plaintiffs' circumstantial evidence of conspiracy falls into three categories: letters to the editor and editorials, communications between NDPA officers and manufacturers, and speeches by NDPA officials. As has been discussed above, both parties agree that there has been significant controversy in the wallpaper industry over the activities of the so-called 800-number dealers. *See* Part I, *supra*. Many of the industry's showroom dealers were upset by the 800-Number dealers' practices. *Id.* As Plaintiffs' evidence shows, these hard feelings led to a great deal of discussion about the 800-number dealers and a great deal of impassioned rhetoric on the part of conventional retailers. However, as will be discussed more fully below, calls for manufacturer action by individual retailers, no matter how strident, do not violate the Sherman Act. *See Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1983). Evidence of calls to action must be accompanied by evidence of a group action or conspiracy. *Id.*

As circumstantial evidence of conspiracy, Plaintiffs first point to letters to the editor that appeared in *Decorating Retailer* and *Wallcovering Industry News*. Plaintiffs' Response, pages 28-31. Plaintiff has selected seventeen letters out of forty-eight monthly issues. *Id.* These letter evidence individual frustration and calls to action, but they do not show conspiracy. They were directed at a large, general audience and there is no evidence who, if anyone read them, and whether any collusive activity result from them.

Plaintiff also points to evidence that those NDPA officials in charge of the NDPA publication solicited letters from former NDPA officers who they knew had strong anti-800 number views. Plaintiffs Ex. 18, Rogers Tr. 116-134. For example, Mr. Rogers testified that in August, 1988 he sent

out advance sheets of the up-coming September issues, but he also testified that he did not know what response he would get. *Id.* at 124. Also, Plaintiff has not presented any evidence that in sending out these advance sheets Defendants stated what kind of response they wished to receive. Finally, the only clear evidence that someone responded to these advance sheets is a letter from a Mr. Roecker published in the November, 1988 issue (we do not know the contents of that letter). *Id.* at 131. At best, this evidence provides scant evidence of conspiracy.

Also in support of it theory of conspiracy, Plaintiffs point to four editorials that appeared in NDPA publications. Plaintiffs Response, pages 32-33; Plaintiffs Ex. 3, 33, 84, 91. While these both contain impassioned rhetoric, two are *post hoc* applause for new polices set by manufacturers, and one is a report on the feelings of the retailing community. *Id.* These three provide scant evidence of a dealer conspiracy. The fourth can be read as a direct call to action, but when taken in context, it provides scant evidence of boycott. Plaintiffs Ex. 91. Also, there is no evidence that anyone paid heed to, or took action based on, this editorial.

Plaintiffs' second category of evidence is comprised of communications between NDPA officials and manufacturers. Plaintiffs Memorandum, pages 34-36. Defendants do not dispute that these communications took place, rather they argue that these conversations are of little import. An examination of these conversations reveals that they are ambiguous in nature, and can be read as legitimate efforts to present the conventional retailers' point of view just as easily as they can be read as threats of group boycotts. For example, Plaintiffs point to Robert Petit's conversations with suppliers' representatives. Plaintiffs Ex. 6, Petit Tr. 15-23. Mr. Petit testified that after the FTC consent order he spoke to the manufacturers about a "level playing field," but he did not testify that he made direct threats of a boycott. *Id.* Similarly, Plaintiffs point to testimony by Clyde Morgan. Plaintiffs Ex. 4, Morgan Tr. 178-180. Mr. Morgan testified that he spoke in his personal

capacity to his own feelings about investing in sample books. *Id.* In short, the evidence of these communications is equally as probative of legitimate activity as it is of prohibited boycott activity. Accordingly, it is not sufficient to overcome the summary judgment standards set out in *Matsushita*.

As a third category of evidence in support of their claims, Plaintiffs point to two speeches given by NDPA officials. Plaintiffs Response, pages 37-38; Plaintiffs Ex. 1, 3, 27. The speech given by Mr. Petit is *post hoc* in nature and does not support Plaintiffs claims. Plaintiffs Ex. 1. Also, and this is particularly true of the Wells speech, there are hearsay problems with this evidence. Plaintiffs' evidence of the Wells speech is a summary account in the May, 1990 edition of *Decorating Retailer*. Even if the newspaper article were properly received into evidence, Plaintiff would still have to overcome the hearsay issue. In short, this is not sufficient evidence to withstand a summary judgment motion. Finally, Mr. Wells' speech, even if accepted, is not strong evidence of conspiracy. *See* Plaintiffs Ex. 3, 27.

Having examined the most salient portions of Plaintiffs' evidence individually, it is also important to examine Plaintiffs' Count I evidence as a whole. Both parties have pointed to a number of cases where a district court has either entered, or refused to enter, summary judgment on a Section 1 conspiracy claim. Plaintiffs cite *Miller v. Indiana Hospital*, 843 F.2d 139 (3rd Cir. 1988), *Tunis Bros. Co., Inc. v. Ford Motor Co.*, 823 F.2d 49 (3rd Cir. 1987), *Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d 1335 (3rd Cir. 1987), *Pennsylvania Dental Association v. Medical Service Association of Pennsylvania*, 815 F.2d 270 (3rd Cir. 1987), and *De Filippo v. Ford Motor Co.*, 516 F.2d 1313 (3rd Cir. 1975). Defendants, for their part, rely heavily on *Regency Oldsmobile, Inc. v. General Motors Corp.*, 723 F. Supp. 250 (D.N.J. 1989) and *O.S.C. Corp. v. Apple Computer, Inc.*, 601 F. Supp. 1274 (C.D. Calif. 1985). When evaluating a motion for summary judgment, the Court must give Plaintiffs full benefit of their proof without tightly compartmentalizing

the various factual components and then wiping the slate clean. *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 699 (1962). Even when one takes this Supreme Court admonition into account, however, summary judgment in Defendants' favor is still appropriate. In short, the evidence of what transpired between the parties in this case is more consistent with what happened in *Regency* and *O.S.C.* than in the cases cited by Plaintiffs. In fact, there is less circumstantial evidence of conspiracy in the instant case than was present in *Regency* where the Third Circuit upheld the district court's decision to grant summary judgment.

In Count IV, Plaintiffs state a claim for relief on the theory that FSC conspired with individual showroom retailers. Plaintiffs, however, fail to put forward any evidence of this conspiracy beyond that put forward for Count I. Accordingly, summary judgment in favor of defendants is appropriate on this count as well.

B. <u>FSC as a Co-conspirator - Count II</u>

In Count II, Plaintiffs claim that FSC joined the showroom retailer conspiracy in violation of Section 1. Amended Complaint, para. 77-80. The Supreme Court has held that independent actions by retailers and manufactures that together have an anti-competitive effect are not illegal under Section 1 of the Sherman Act. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763-4 (1983). Defendant FSC denied this claim and cites testimony by FSC officials to that effect. FSC Memorandum, pages 14; FSC Ex. 3 at 102-103; Ex. 9 at 252-255; Ex. 16 at 44-45, 166; Ex. 17 at 213-214. In order for an antitrust plaintiff alleging conspiracy to survive a motion for summary judgment, he must show

> something more than evidence of complaints. . . . There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. . . . [T]he

> antitrust plaintiff should present direct or circumstantial that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'

Monsanto, 465 U.S. at 764. *See also Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 878 F.2d 801, 804 (4th Cir. 1989); *Lovett v. General Motors Corp.*, 769 F. Supp. 1506, 1510 (D. Minn. 1991). Although dealer complaints may have some probative value, the burden remains on the plaintiff to introduce additional evidence to support a finding of unlawful conspiracy. *Monsanto*, 465 U.S. at 764 n. 8.

The key to deciding whether summary judgment is appropriate on this count is to determine whether the evidence of retailers' communications with FSC that Plaintiffs have put forward is consistent with a finding that a conspiracy existed between FSC and the retailers. "The common practice of complaining, even about a discounting competitor, is insufficient to establish an inference of . . . conspiracy." *O.S.C. Corp. v. Apple Computer, Inc.*, 601 F. Supp. 1274, 1293 (C.D. Calif. 1985). A manufacturer generally has the right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. *Regency Oldsmobile, Inc. v. General Motors Corp.*, 723 F. Supp. 250, 258 (D.N.J. 1989). Dealer complaints about price cutters are part of the natural process of interaction between a manufacturer and its distributors. *Id.*

> Permitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about "in response" to complaints, could deter or penalize perfectly legitimate conduct. As Monsanto points out, complaints about price cutters "are natural -- and from the manufacturer's perspective, unavoidable --

> reactions by distributors to activities of their rivals.

Monsanto, 465 U.S. at 763. *See also Regency*, 723 F. Supp. at 258. To withstand a motion for summary judgment, the plaintiff must put forward evidence that tends to exclude the possibility that the manufacturers and the complaining distributors were acting independently. *Regency*, 723 F. Supp. at 258. The antitrust plaintiff should present evidence that the manufacturer and others "had a conscious commitment to a common scheme designed to achieve and unlawful objective." *Id.* A simple showing of voluminous and virulent complaints to the manufacturer, without more, is insufficient to show conspiracy. *O.S.C. Computer*, 601 F. Supp. at 1294.

Plaintiffs make a number of arguments against FSC's motion on this count. First, Plaintiffs argue that the record is devoid of proof that FSC's conduct was independent of the NDPA's pressure. Plaintiffs' Response, pages 49-52. In making this argument, Plaintiffs are impermissibly attempting to shift the burden of proof over to Defendants. As the foregoing discussion of *Monsanto* and *Matsushita* states, Plaintiffs bear the burden of showing that evidence that tends to exclude the possibility that Defendants were acting independently. Plaintiffs own evidentiary submissions show that many retailers were upset that they had invested a great deal of money in purchasing sample books and that the 800-number dealers would "free-ride" off this investment. Indeed, these concerns are at the heart of the hard feelings between the two groups. Defendants argue in their brief that based on the record FSC had legitimate concerns that showroom retailers would no longer be willing to purchase these sample books from FSC. The burden rests on Plaintiffs to point to evidence that tends to exclude the possibility that Defendants were acting independently.

Plaintiffs point to a number of pieces of evidence that suggest that FSC executives discussed the 800-number and

"pirate" situation at various internal meetings. Plaintiffs' Response, pages 49-51. Plaintiff also points to various letters written to FSC by showroom retailers and letters to the editor that appeared in industry trade journals. Plaintiffs Response, pages 56-59. Plaintiffs are correct that FSC was aware of the anti-800 number sentiments held by many of the showroom retailers. *See* FSC Ex. 16. Plaintiffs are also correct that the use of the term "pirates" in company memoranda when referring to 800 number dealers could be seen as evidence of an anti-800 number bias. However, as in *Monsanto, O.S.C. Computer,* and *Regency Oldsmobile,* this evidence without more is insufficient to find a violation of Section 1 of the Sherman Act.

Finally, Plaintiffs argue that they have provided sufficient evidence of an antitrust conspiracy made up of retailers belonging to the NDPA, and that FSC need not have knowingly joined the retailer conspiracy as long as it acted in furtherance of this conspiracy. This is simply an incorrect statement of Section 1 antitrust law. "The antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others *'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" Monsanto Co. v. Spray-Rite Service Corp.,* 465 U.S. at 764 (emphasis added). Furthermore, as has been discussed above, Plaintiffs have failed to present sufficient evidence that a showroom dealer/NDPA conspiracy existed.

In support of their claim in Count II, Plaintiffs cite *Lovett v. General Motors Corp.,* 769 F. Supp. 1506 (D. Minn. 1991) as controlling. In *Lovett,* the plaintiff, a car dealer, sold cars at $49 over the manufacturers invoice price. Various Twin Cities General Motors dealers brought pressure on General Motors to stop the plaintiffs practices, which General Motors did. The jury found that General Motors had violated Section 1 of the Sherman Act. The district court declined to grant General Motor's motion for j.n.o.v. The evidence of conspiracy in *Lovett* was much stronger than that presented by Plaintiffs and *Lovett* is therefore not

helpful to Plaintiffs' position. *Parkway Gallery Furniture v. Kittinger/Pennsylvania*, 878 F.2d 801 (4th Cir. 1989), provides persuasive authority that Plaintiffs' evidence of conspiracy is insufficient to withstand summary judgment. In *Parkway*, the Fourth Circuit upheld the district court in granting summary judgment in the defendant's favor even though the plaintiffs had introduced evidence that the defendant manufacturer had "pledged" to support the alleged co-conspirator retailers. The evidence put forward by the *Parkway* plaintiff was stronger than that presented by Plaintiffs, but was still insufficient to withstand a motion for summary judgment.

Plaintiffs have not presented evidence that tends to exclude that FSC was acting independently when it developed its marketing and drop-shipment policies. Therefore, FSC's motion for summary judgment must be granted as to Count II.

C. Conspiracy Between FSC and Other Manufacturers - Count III

In Count III, Plaintiffs claim that FSC conspired with other wallpaper manufacturers against 800 number dealers in violation of the Section 1 of the Sherman Act. FSC puts forward testimony by its employees and employees of other wallpaper manufacturers that these companies adopted the various practices and programs that Plaintiffs complaint of independently of one another. FSC Memorandum, pages 10-11; FSC Ex. 2 at 246-247; Ex. 3 at 110; Ex. 9 at 260-270, 272-274, 276-279; Ex. 16 at 70-75, 165-166; Ex. 17 at 89-91. For their part, Plaintiffs point to evidence of significant contacts between FSC officials and officials of other manufacturers. Plaintiffs Response, pages 69-76.

Evidence of parallel conduct alone is not enough to show antitrust conspiracy. *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 253 (2d Cir. 1987). This is true even if the defendant knows that other companies are taking actions similar to its

own. *Id.* Since parallel conduct in and of itself is insufficient to show conspiracy, courts have held that a plaintiff must show additional circumstances -- so-called "plus factors" -- which, when viewed in conjunction with the parallel conduct, justifies an inference of conspiracy. *Id.* These plus factors include a common motive, a high level of interfirm contact, and actions taken that are against the individual self-interest of the alleged co-conspirators. *Id.* at 254. The Second Circuit is careful to point out that even evidence of a common motive and a high level of interfirm contact could plausibly lead to an inference of mere interdependent behavior rather than conspiracy. *Id.* Therefore, evidence of plus factors such as actions taken against self-interest are also important. *Id.* The Third Circuit has adopted largely the same standards as the Second Circuit. *See, e.g., Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977).

Plaintiffs do not significantly add to or challenge the recitation of evidence of parallel conduct provided by Defendants as noted above. Rather, plaintiffs point to evidence of a high level of interfirm contact, which FSC does not dispute. Plaintiffs Response, pages 69-79; *See*, e.g., Plaintiffs Ex. 2 at 35-36, 45-50, 55-57, 94, 102-105; Ex. 7, 12, 32; Ex. 71 at 113-114; Ex. 107, 109, 110; Ex. 111 at 89-100; Ex. 130, 132. While Plaintiffs have produced a good deal of evidence of interfirm contact, none of the cited communications provide explicit evidence of an intent to conspire. Therefore, the Court must look to evidence of other plus factors.

In arguing the existence of a motive plus factor, Plaintiffs state that

> a decision by any one supplier to collect state sales taxes would result in increasing the price of that supplier's product to consumers. Similarly, a unilateral decision to impose a drop shipment surcharge could result in raising the price of that supplier's product and making the product less competitive in the marketplace.

Plaintiffs Memorandum, page 79. Plaintiffs do not cite any record evidence to support this proposition. As FSC points out, this proposition alone without any citation to the record is insufficient to show a motive plus factor.

Plaintiffs' argument in support of activity against individual self-interest as a plus factor is similarly sketchy. Plaintiffs assert that "[t]he record supports the inference that, although each manufacturer might generally have supported imposition of restraints against 800 number dealers, they were unwilling, individually, to risk the loss of 20 percent of wallcovering industry sales." Plaintiffs Response, page 80. FSC argues that the claim that it acted against itself interest is incorrect. FSC Reply Brief, pages 8-9. FSC points out that the only record evidence for Plaintiffs' statement is a news article (Plaintiffs Ex. 73) in which Mr. Landau of FSC noted that the 800 number dealers accounted for twenty percent of the retail wallcovering business. Id. FSC argues that Plaintiffs have presented no evidence that permits the inference that FSC was unwilling to risk the loss of its 800 number business. FSC points out that its representatives have testified that they did not know whether FSC competitors would adopt local trading area policies or drop shipment surcharge policies and that they hoped no other supplier would do so (because it would have the effect of destroying their comparative advantage). *See, e.g.*, FSC Ex. 3 at 96-97, 110-111; FSC Ex. 9 at 300-302. FSC suggests that rather than being against their self-interest, these policies would give FSC an advantage over its competitors if FSC was the only one to adopt them. Since Plaintiffs have not offered any record evidence to support their hypothesis and FSC has offered evidence to the contrary, the Court concludes that FSC has met its summary judgment burden.

In light of the absence of any plus factors other than interfirm communications, the Court must conclude that Plaintiffs have failed to present evidence which tends to exclude the inference that FSC was acting independently.

Accordingly, summary judgment in FSC's favor is appropriate on Count III.

D. Claims Under Pennsylvania Antitrust Law[1]

All parties agree that Pennsylvania has no statutory antitrust provisions that parallel the Sherman and Clayton Acts. Instead, antitrust is governed by common law causes of action which follow federal antitrust law as embodied in the Sherman Act. *See, e.g., Schwartz v. Laundry & Linen Supply Drivers' Union, Local 187*, 14 A.2d 438 (Pa. 1940); *Collins v. Main Line Bd. of Realtors*, 304 A.2d 493, 496 (Pa. 1973). Since the Court has ruled that summary judgment in NDPA's favor is appropriate on the federal antitrust counts brought against NDPA, summary judgment in NDPA's favor is also appropriate on Count VI. Also, since the Court will grant summary judgment in FSC's favor on Counts II and III, and Count V is brought under the Clayton Act for discrimination in allocation of advertising allowances, not restraint of trade under the Sherman Act, the Court will grant summary judgment in FSC's favor on Count VI as well.

(IV)

In addition to the federal and state antitrust claims, Plaintiffs have brought a number of pendant state claims

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[1] In its motion for summary judgment on Plaintiffs' state law claims, NDPA argues that the Court should dismiss these claims without considering them for lack of jurisdiction. In their amended complaint, Plaintiffs assert that the Court has jurisdiction over the state claims under the doctrine of supplemental jurisdiction, 28 U.S.C. § 1367. Amended Complaint, paragraph 93. NDPA argues that under *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966) (now codified by 28 U.S.C. § 1367), the Court should dismiss the state law claims against NDPA. The Court has continuing jurisdiction over the federal antitrust claim made in Count V. Though Count V is not brought against NDPA, and the Court could probably dismiss the state claims against NDPA on pendant jurisdiction grounds, summary judgment in NDPA's favor is appropriate on the state claims. Accordingly, the Court will not dismiss the state claims for lack of pendant jurisdiction.

against both FSC and NDPA. These claims all arise out of the same set of operative facts as the antitrust claims. Defendants FSC and NDPA have moved for summary judgment on each claim. Plaintiffs argue against summary judgment on each claim, but only argue seriously against a few. On all these state claims, the facts are not seriously in dispute, rather the debate centers around whether Plaintiffs have stated facts sufficient as a matter of law to support the claims they assert.

A. Tortious Interference - Count VII

Plaintiffs actually state two separate theories of tortious interference in Count VII: (1) tortious interference with contract and (2) tortious interference with prospective business relationships. Amended Complaint, paragraph 98. Under Pennsylvania law, Plaintiffs must prove the following elements to succeed on a claim of tortious interference with contract: (1) the existence of a contract with a third party, (2) that defendant interfered with the third party's performance of the contract, (3) that defendant's interference was improper, and (4) that the plaintiff suffered harm. *Stout v. Peugeot Motors of America*, 662 F. Supp. 1016, 1018-19 (E.D. Pa. 1986). To prove a claim of tortious interference with prospective business relationships, a plaintiff must show the following: (1) the existence of a prospective contractual relationship, (2) a purpose or intent on the part of the defendant to prevent the relation from occurring, (3) the absence of privilege or justification on the part of defendant, and (4) actual damages. *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 471 (Pa. 1979).

In bringing these claims, Plaintiffs assert that by implementing the drop shipment charges and local area trading policy, FSC interfered with Plaintiffs relations with existing and future customers. Plaintiffs' Response, pages 84-85. FSC raise a number of arguments for why they are entitled to summary judgment on this count, however, their principle argument is that a manufacturer is entitled to deal

-- or not to deal -- with whomever it chooses. FSC's Memorandum, pages 3-6. FSC states that since it did not act in violation of the antitrust laws, it was justified in adopting the drop shipment charges and local area sales policy. Plaintiffs argue against FSC's justification position by re-stating their antitrust claims.

A manufacturer may independently announce the terms under which it will do business and refuse to deal with any customer who fails to comply.

> The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce – in a word to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell.

United States v. Colgate & Co., 250 U.S. 300, 307 (1919). Also, in the absence of a legal duty of one firm to deal with another, "[m]ere unilateral refusal to deal with another in a business matter is not tortious." *A-1 Credit and Assurance Co. v. Trans Union Credit Information Co.*, 678 F. Supp. 1147, 1150 (E.D.Pa. 1988). Therefore, in unilaterally adopting the drop shipment and local trading area policies, FSC was stating the terms under which it would deal with the 800 number dealers. The fact that this may have altered the 800 number dealers' relationships with their customers does not mean that FSC tortiously interfered with those relationships.[2]

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[2] FSC has not moved for summary judgment on Count V which states a claim for relief under Section 2(d) of the Clayton Act, 15 U.S.C. § 13(d).

As an alternative grounds for summary judgment on the tortious interference claims, FSC argues that it did not interfere with any of Plaintiffs existing contracts because it announced its new policies well in advance. FSC's Memorandum, pages 6-8. FSC also argues that it cannot be held liable for tortiously interfering with Plaintiffs' prospective business relations because Plaintiffs have failed to identify any future contracts. *Id.* at 9-11. Plaintiffs do not seriously counter these arguments. They identify the existing contractual relations as "on-going business relationships with customers located all over the United States. These orders were not defined in terms of specific orders, but were defined by patterns and courses in dealing." Plaintiffs Response, page 87. Similarly, in support of their prospective contractual relations claims, Plaintiffs argue that "[e]ach plaintiff has established a clear pattern of customers continuing to respond to its advertisements, calling them and placing orders. Moreover, plaintiffs have testified that because of the local trading policy, they were required to reject orders." *Id.* at 87-8, Simply stated, Plaintiffs' identification of existing and prospective contractual relations is too general, and for this reason fails to state facts sufficient to support a tortious interference claim. *See Thompson Coal Co.*, 412 A.2d at 471; *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 925 (3d Cir. 1990).

Plaintiffs brought their tortious interference claims against NDPA as well, and NDPA has moved for summary judgment. As with the claims against FSC, Plaintiffs have failed to produce facts that identify the actual or prospective contractual relations with which NDPA is supposed to have interfered. Furthermore, as has been stated above, in the absence of violations of the antitrust laws, FSC had a right to set the terms under which it would deal with Plaintiffs. For this same reason, individual lobbying efforts on the part of NDPA members does not constitute tortious interference.

Plaintiffs claim that FSC's conduct constitutes discrimination in allocation of advertising. This claim does not implicate the conduct Plaintiffs complain of in bringing their tortious interference claims -- namely the local area trading policy and the drop shipment charges.

B. Fraud & Misrepresentation - Count VIII

In Count VIII, Plaintiffs claim that FSC is liable for fraud and misrepresentation for making misrepresentations and omissions regarding the reasons for FSC's collection of surcharges and sales and use taxes. Amended Complaint, paragraph 105. Under Pennsylvania law, the tort cause of action for deceit is made up of five elements:

> 1) a false representation -- usually of fact -- made by the defendant;
>
> 2) knowledge or belief on the part of the defendant that the representation is false, or an insufficient basis to make the representation;
>
> 3) an intention to induce the plaintiff to act or refrain from acting in reliance on the information;
>
> 4) justifiable reliance by the defendant; and
>
> 5) damage to the plaintiff resulting from the reliance.

W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, § 105, at 728 (5th ed. 1984); *see also Frowen v. Blank*, 425 A.2d 412, 415 (Pa. 1981) (Fraud consists of anything calculated to deceive); *Kuehner v. Parsons*, 527 A.2d 627, 629, *appeal denied* 538 A.2d 879 (Pa. Cmwlth 1987) (Actual fraud has five elements: there must be misrepresentation of material fact; scienter; intention by maker to induce recipient to act; justifiable reliance by recipient upon misrepresentation; and damage to recipient as proximate result); *Marian Bank v. International Harvester*, 550 F. Supp. 456, 461 (E.D.Pa. 1982); *Girard Bank v. John Hancock Mut. Life Ins. Co.*, 524 F. Supp. 884, 894 (E.D.Pa. 1981); Restatement (Second) of Torts § 525 (1977).

In moving for summary judgment, FSC argues that "Plaintiffs' fraud claim cannot survive summary judgment because plaintiffs' uncontroverted admissions establish that they did not believe that [FSC's] representations were true

and never took (or refrained from taking) any action in reliance upon such alleged misrepresentations." FSC 's Memorandum page 12. In support of this position, FSC cites numerous portions of the transcripts from the Plaintiffs' depositions in which Plaintiffs testified that they did not believe FSC's stated reasons for these surcharges, and that they viewed the surcharges as an excuse on FSC's part to make it harder for Plaintiffs to sell on a national basis. FSC's Memorandum, pages 13-15. *See e.g.*, FSC Ex. 1 at 204-5, 651; Ex. 3 at 520-21; Ex. 4 at 451-453; Ex. 5 at 361, 368; Ex. 6 at 510; Ex. 7 at 334; Ex. 8 at 109; Ex. 11 at 136; Ex. 12 at 176; Ex. 13 at 692-693. FSC argues that these admissions show conclusively that Plaintiffs did not rely on FSC's statements.

Plaintiffs do not challenge either FSC's statement of the law of misrepresentation, or FSC's factual assertions about the individual plaintiffs' admissions. Plaintiffs' Response, pages 90-1. Rather, Plaintiffs argue that they satisfy the "justifiable reliance" element of misrepresentation because "[t]he proof shows that plaintiffs in fact relied, *i.e.*, they paid the sales tax and drop shipment surcharges." *Id.* at 91. In effect, Plaintiffs are arguing that through the act of paying the charges billed by FSC, they relied on FSC's statement. This argument is based on an incorrect view of the law. The question is not whether Plaintiffs in fact acted, rather the question is whether Plaintiffs acted *in reliance* on FSC's statements about the nature of the charges they were paying. *See* Prosser, § 105, at 728. The uncontradicted evidence noted above shows that Plaintiffs categorically did not believe FSC's representations. As Plaintiffs state in their brief, Plaintiffs had a choice of paying the additional charges or having FSC refuse to sell to them, and Plaintiffs choose to pay. Plaintiffs Response, page 14. FSC is entitled to summary judgment on Count VIII because Plaintiffs have failed to present evidence that shows a genuine issue of fact on their misrepresentation claim.

C. Conversion - Count IX

Count IX of the Amended Complaint states a claim for conversion against FSC for collecting sales and use tax

from Plaintiffs on interstate shipments. Conversion "is the deprivation of another's right of property in, or use or possession of, a chattel, or other interference therewith, without the owner's consent and without lawful justification." *Stevenson v. Economy Bank of Ambridge*, 197 A.2d 721, 726 (Pa. 1964). *See also Norriton East Realty Corp. v. Central-Penn Nat'l Bank*, 254 A.2d 637 (Pa. 1969). FSC moves for summary judgment on this conversion count because Plaintiffs have failed to show that FSC wrongfully obtained possession of, or control over, Plaintiffs' sales tax payments without plaintiffs' consent. FSC's Memorandum, pages 15-6. FSC argues, and presents evidence to the effect, that it collected the money in question as sales tax, and with the understanding that FSC would remit the money collected as sales tax to the proper authorities. Plaintiffs do not challenge the facts cited by FSC, rather they argue that FSC had no legal obligation to collect the sales taxes, and that Plaintiffs had no obligation to pay sales tax to FSC. Plaintiffs' Response, pages 92-3. Plaintiffs do not allege that FSC collected the money as sales tax, and then put the money to FSC's own private uses.

Based on the facts put forward by the parties, Plaintiffs have failed to present a proper claim for conversion. Plaintiffs voluntarily paid the money that FSC claimed they owed as sales tax. Therefore FSC obtained the money with Plaintiffs' consent. Also, there is no allegation that, once having obtained the money with Plaintiffs' consent, FSC then converted the money to their own private uses. In sum, the fact that FSC may not have been legally obligated to collect sales tax and that Plaintiffs may not have been legally obligated to pay it, does not mean that FSC converted the funds by collecting them (with Plaintiffs' consent) and passing them on to the state tax authorities. Summary judgment in favor of FSC is appropriate on Count IX as well.

D. <u>Defamation and Disparagement - Counts X & XI</u>

Plaintiffs bring this defamation and commercial disparagement claim against FSC based on a prerecorded phone message that FSC played to some of its customers

who telephone FSC's offices. Amended Complaint, para. 121; Plaintiffs Ex. 113). Under Pennsylvania law, defamation and commercial disparagement are two distinct causes of action. A defamatory statement is one that tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. *U.S. Healthcare v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 923 (3d Cir. 1990). In a defamation action, "the plaintiff has the burden of proving (1) the defamatory character of the communication; (2) its publication by the defendant; (3) its application to the plaintiff; (4) an understanding by the reader or listener of its defamatory meaning; and (5) an understanding by the reader or listener of an intent by the defendant that the statement refer to the plaintiff." *Id.* In addition, to recover damages, the plaintiff must demonstrate that the statement results from fault, amounting to at least negligence on the part of the defendant. *Id.*

A commercially disparaging statement "is one 'which is intended by its publisher to be understood or which is reasonably understood to cast doubt upon the existence or extent of another's property in land, chattels or intangible things, or upon their quality, ...if the matter is so understood.'" *Id.* at 924. To prove commercial disparagement, a plaintiff "must prove (1) that the disparaging statement of fact is untrue or that the disparaging statement of opinion is incorrect; (2) that no privilege attaches to the statement; and (3) that the plaintiff suffered a direct pecuniary loss as a result of the disparagement." *U.S. Healthcare*, 898 F.2d at 924. Defamation and commercial disparagement are distinct causes of action. *Id.* "an action for commercial disparagement is meant to compensate a vendor for pecuniary loss suffered because statements attacking the quality of his goods have reduced their marketability, while defamation is meant [to] protect an entity's interest in character and reputation. *Id.*

In moving for summary judgment on Plaintiffs' defamation claim, FSC argues that Plaintiffs cannot prove that the telephone message either applied to any individual plaintiff specifically, or that a listener ever understood its

defamatory meaning. In support of this position, FSC cites excerpts from depositions of Plaintiffs where Plaintiffs state that the message did not refer to any of them specifically. FSC Memorandum, page 20; FSC Ex. 1 at 667-668; Ex. 3 at 533-535; Ex. 4 at 603; Ex. 5 at 520-521; Ex. 7 at 418-421; Ex. 8 at 380-383. Plaintiffs respond by arguing that "[u]nder Pennsylvania law, a defamatory statement against a group of actionable if the parameters of the group are well-known and if the libel could reasonably be expected to substantially impact all members of the group being disparaged." Plaintiffs Response, pages 96-7. Plaintiffs go on to state -- without citing any factual support -- that "800 number wallcovering dealers are a well defined group and a consumer could reasonably determine that a broad-based attack on all 800 number wallcovering dealers encompasses each and everyone of the plaintiffs." *Id.* at 97.

As has been stated above, Plaintiffs bear the burden of proving each of the elements of defamation. Also, since this issue has been raised in the context of a motion for summary judgment, Plaintiffs bear the burden of point to evidence that suggests there is a genuine issue of material fact as to whether FSC defamed Plaintiffs. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1985). Plaintiffs correctly state that under certain circumstances an individual can bring a defamation suit for defamatory statements made about a group. *See Farrell v. Triangle Publications, Inc.*, 159 A.2d 734 (Pa. 1960). In this case, however, even if one assumes that FSC's telephone message is defamatory as a matter of law, Plaintiffs have failed to point to any evidence in the record that 800 number dealers are a group sufficiently defined that these individual plaintiffs can bring suit for defamation.[3] Furthermore, Plaintiffs neither address, nor present facts to contradict, FSC's argument that Plaintiffs have failed to present any evidence that someone who heard the message had an understanding of the message's defamatory

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[3] in discussing FSC's motion for summary judgment on the antitrust counts, Plaintiffs cite evidence to suggest that 800 number dealers make up 20% of the relevant wallcovering market. This evidence is far from precise, but it would tend to suggest that the number of wallpaper retailers who sell through 800 numbers is quite large. Therefore, this figure hurts rather than helps Plaintiffs' defamation claim.

meaning. Plaintiffs have failed to carry their summary judgment burden.

In addressing Plaintiffs' commercial disparagement claim, FSC points out that its message referred to 800 number dealers, not their products. FSC's Memorandum, pages 20-1; *see also* Plaintiffs Ex. 113. Secondly, FSC argues that even if one were to read the message as referring to Plaintiffs' products, the disparagement claim must still fail because these plaintiffs have not proved that the message referred to them specifically. In response, Plaiktiffs argue that they "are selling an indivisible combination of goods and services....By stating that the plaintiffs are disreputable and by suggesting that their service is less than adequate, the totality of the product being sold by plaintiffs is being disparaged." Plaintiffs' Response, page 97. Plaintiffs' argument is unpersuasive. The alleged "indivisible combination of goods and services" is really a claim for defamation not commercial disparagement. Plaintiffs have failed to adequately identify any goods that have been disparaged. In fact, the goods Plaintiffs sell are manufactured by FSC, and the fact that Plaintiffs offer less service (and correspondingly lower prices than conventional showroom retailers is at the heart of the hard feelings between the two types of retailers. Even if one were to assume that Plaintiffs have adequately identified a "good" that has been disparaged, Plaintiffs still have not presented sufficient evidence to show that this is a group disparagement that lends itself to individual prosecution. Finally, Plaintiffs have presented no evidence of loss due to the disparaging comments.

Plaintiffs brought their defamation and disparagement claim against NDPA as well as FSC. As evidence of NDPA's tortious conduct, Plaintiffs cite numerous articles from NDPA publications which refer to 800 number dealers as "pirates." Plaintiffs Response, pages 94-95. NDPA has moved for summary judgment on this count for the same reasons as FSC. NDPA argues that Plaintiffs have failed to offer evidence that the disparaging remarks made about 800 number dealers in general can be said to apply to any individual Plaintiffs in this action. NDPA Memorandum, page 7. Also, NDPA argues that

Plaintiffs have failed to support their defamation claim with evidence of a person who understood the defamatory comments to apply to the Plaintiffs. For the reasons given above with regard to FSC, summary judgment in NDPA's favor on Count X is also appropriate.

E. **Breach of Contract - Count XII**

Count XII alleges that FSC breached its sample book contracts with Plaintiffs by implementing the local trading area policy. Amended Complaint, para. 125; Plaintiffs' Response, page 97-8. Plaintiffs claim that in entering these contracts, they had a "reasonable expectation" that they would be able to conduct business on a nationwide basis. Plaintiffs claim that FSC breached this alleged term of the contract when it implemented its local area trading policy. In moving for summary judgment, FSC argues that the ability to trade on a nationwide basis was never a term in the contract.

An uncommunicated expectation of one party to a contract cannot as a matter of law create an enforceable obligation with the other party to the contract. *Mellon Bank, N.A. v. Aetna Business Credit, Inc.*, 619 F.2d 1001, 1009 (3d Cir. 1980); *Brokers Title Co. v. St. Paul Fire & Marine Ins. Co.*, 610 F.2d 1174, 1178 (3d Cir. 1979). As evidence of the contract, both parties cite the written brochure retailers use to enroll in the sample book program. Plaintiffs Ex. 116. The ability to sell FSC products on a nationwide basis was not explicitly written into the contract. *Id*. As support for their assertion that Plaintiffs had a "reasonable expectation" of selling on a nationwide basis and that this expectation was a term of the contract, Plaintiffs cite the testimony of Michael Lando. Plaintiffs Ex. 121, Lando Tr. at 306-312. Mr. Lando testified to the following:

> Q. When he sold you the books, did [the FSC representative] tell you that it was upon the understanding that you could sell wallcovering nationally that he was selling you the books?

> A. He never used those words. That was the understanding. We knew how the books were used. He knew. Alan Carnevale knew.
>
> Q: Did Mr. Carnevale ever tell you that you were purchasing the books upon the understanding that you would be permitted to sell nationally?
>
> A: No. But we had many conversations in which he and I discussed the fact that we used their materials, not just books, but catalogs as well, to sell wallcoverings nationally.

Id. at 308. Plaintiffs' evidence is testimony by one of the plaintiffs about the deponent's beliefs regarding FSC's representative's subjective mental state. Plaintiffs do not present evidence of an oral term that did not make its way into the writing. Instead, Plaintiffs have presented evidence of an uncommunicated expectation which, as a matter of law, cannot create a binding obligation. *Mellon Bank*, 619 F.2d at 1009 (3d Cir. 1980); *Brokers Title Co.*, 610 F.2d at 1178 (3d Cir. 1979). Summary judgment in FSC's favor is therefore appropriate on Count XII.

(V)

Plaintiffs (counterclaim defendants) have moved for summary judgment on eleven of FSC's (counterclaim plaintiff's) thirteen counterclaims.[4] While FSC has brought eleven individual counts against Plaintiffs, FSC actually states only three causes of action. Counterclaim Counts I, II, and III state claims for tortious interference with contract against American Blind Factory, Inc. ("American Blind"), Delta Paint and Wallpaper Supply, Inc. ("Delta"), and Yankee Wallcoverings, Inc. ("Yankee") respectively. Counts IV, V, VI, and VII state claims for relief for defamation

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[4] For purposes of the counterclaims found in FSC's answer, Plaintiffs are the counterclaim defendants and FSC is the counterclaim plaintiff. For ease of reference, however, the Court will continue to use the term "Plaintiffs" to identify the counterclaim defendants, and the term "FSC" to identify the counterclaim plaintiff.

against American Blind, Delta, Silver Wallpaper & Paint Co., Inc. ("Silver"), and Yankee respectively. Finally, Counts VIII, IX, X, and XI state claims for relief for injurious falsehood and disparagement against American Blind, Delta, Silver, and Yankee respectively. Plaintiffs also seek partial summary judgment on FSC's first affirmative defense and NDPA's third affirmative defense which state that some of the facts Plaintiffs seek to rely on in bringing their federal antitrust claims are barred by the statute of limitations. The Court will granted FSC and NDPA's motions for summary judgment on Plaintiffs' Sherman Act claims. Therefore, the Court need not address FSC and NDPA's affirmative defenses, and Plaintiffs' motion for summary judgment on the affirmative defenses will be denied.

In bringing these counterclaims, FSC claims that the Court has jurisdiction pursuant to its diversity powers, 28 U.S.C. § 1332. Since these are all state law claims, the Court must decide which states' laws to apply. The parties agree that the Court should apply Pennsylvania law when considering the defamation and injurious falsehood claims, Counts IV through XI. For the tortious interference with contract claims, Counts I through III, Plaintiffs argue that the Court should apply Pennsylvania law since there is no significant difference between Pennsylvania's law of tortious interference and that of New Jersey, Massachusetts, and Michigan. FSC argues that the Court should apply New Jersey, Michigan, and Massachusetts law rather than Pennsylvania law.

A. Choice of Law

In arguing that the Court should look to the law of each of American Blind, Delta, and Yankee's home states rather than to Pennsylvania law, FSC makes two arguments. First, FSC argues that New Jersey, Michigan, and Massachusetts take a broader view of what types of business relations, or business expectancies, can be the subject of a tortious interference suit. Second, FSC argues that the contacts of the parties and the events that transpired between them mean that Massachusetts, New Jersey, and Michigan have a greater interest in these suits than

Pennsylvania. Plaintiffs, for their part, argue that the laws of these three states and those of Pennsylvania are substantially the same. The Court agrees with Plaintiffs.

Federal courts sitting in diversity that are faced with a conflicts of law issue must apply the choice of law rules of the forum state. *In re Complaint of Bankers' Trust Co.*, 752 F.2d 874 (3d Cir. 1984). "[U]nder Pennsylvania choice-of-law principles, the place having the most interest in the problem and which is the most intimately concerned with the outcome is the forum whose law should be applied." *Id.* at 882. FSC argues that Massachusetts, New Jersey, and Michigan have greater contacts with these events and that their policies and state interests are therefore more directly effected. The Court finds this position somewhat puzzling since FSC does not make the corresponding argument about its claims for defamation and injurious falsehood. Presumably, Massachusetts, New Jersey, and Michigan have no less of a state policy interest in these latter two claims than they might have in the tortious interference claims. The Court need not decide this conflicts of law issue on these grounds, however, because the tortious interference laws of all four states do not differ significantly. When the foreign law to which the forum's choice of law rule refers does not differ from that of the forum's law on the issue, then the issue is a "false conflict" and the forum's law should apply. *Id.*

In support of its position, FSC cites *Leslie Blau Co. v. Alfieri*, 384 A.2d 859 (N.J. Super. App. Div. 1978), *Powers v. Leno*, 509 N.E.2d 46 (Mass. App. Ct. 1987), and *Trepel v. Pontiac Osteopathic Hospital*, 354 N.W.2d 341 (Mich. Ct. App. 1984). Having reviewed these cases, the Court can find no substantial difference between the laws of these states and that of Pennsylvania. In all four states, the plaintiff must show the existence of a contractual relationship for a claim of tortious interference with contract to go forward. For a claim of tortious interference with a prospective contract, all four states allow something less than a formal contract, but require something more than a mere expectancy. Furthermore, in all three of the non-Pennsylvania cases FSC cites, the plaintiff lost some form of direct payment from the defendant. In *Powers*, the suit was between a vendor and

vendee of land. In *Trepel*, the plaintiff hospital expected to get a bond issue approved by an oversight agency. In *Leslie Blau Co.*, the plaintiff broker sued to recover a lost commission. In all three of these cases, the plaintiffs lost an economic benefit that was due to come directly from a third party. FSC stands in a different position. As FSC's own executives have stated, FSC does not sell directly to consumers. Plaintiffs Ex. C, Chevallier Tr. 58, 90-92. Instead, FSC sells to retailers who then in turn sell to consumers.

Therefore, for FSC to claim that Plaintiffs interfered with an existing contract with, or a prospective business advantage derived from, consumers is stretching the law of tortious interference in any of the four states too far. Furthermore, all four states look to Restatement Second of Torts § 766B for guidance. Accordingly, the Court finds that the laws tortious interference of Massachusetts, New Jersey, and Michigan do not significantly differ from Pennsylvania's, and the Court shall look to Pennsylvania law for guidance. *In re Bankers' Trust Co.*, 752 F.2d at 882.

B. Tortious Interference - Counts I, II, and III

The Court has set forth and discussed the elements required for a claim of tortious interference with contract, or prospective contractual relations under Pennsylvania law, in Part III(A) above and for the sake of brevity the Court will not repeat that discussion here. FSC bases its claims for tortious interference with existing and prospective contractual relations on the communications plaintiffs American Blind, Delta, and Yankee had with some of their customers in reaction to various business policies FSC adopted. *See, e.g.*, Plaintiffs Ex. C, Chevallier Tr. Ex. 21, Ex. 22; Exhibit D, Martin Tr. Ex. 2 at 4-5, Ex. 3 at 5. Plaintiffs argue that they are entitled to summary judgment on Counts I, II, and III because FSC does not sell its products directly to consumers and therefore cannot point to any existing or potential contractual relations. In support of this position, Plaintiffs cite the testimony of Raymond Chevallier, Vice President of FSC for marketing. Mr. Chevalier testified to the fact that FSC is "not set up to sell

wallpaper directly to the consumer as a normal course of business." Plaintiffs Ex. C, Chevallier Tr. 58; *see also Id.* at 90-92. FSC's argues that it "had a reasonable expectation of economic advantage in the form of profits from the sale of its products to dealers who would resell them to consumers who had a desire to purchase FSC products and were then dissuaded from doing so by the actions of counterdefendants," and offers evidence of people who were turned away. FSC's Response, page 9. As has been discussed above, FSC proposes a too attenuated connection between itself and the consumer to support a cause of action for tortious interference. *See, e.g., U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914 (3d Cir. 1990); *See also Leslie Blau Co. v. Alfieri*, 384 A.2d 859 (N.J. Super. App. Div. 1978), *Powers v. Leno*, 509 N.E.2d 46 (Mass. App. Ct. 1987), and *Trepel v. Pontiac Osteopathic Hospital*, 354 N.W.2d 341 (Mich. Ct. App. 1984). Accordingly, plaintiffs American Blind, Delta, and Yankee are entitled to summary judgment on counterclaim counts I, II, III.

C. Defamation - Counts IV, V, VI, VII

In Counterclaim Counts IV, V, VI, and VII, FSC states claims for defamation against American Blind, Delta, Silver, and Yankee. In order to prove defamation under Pennsylvania law, a plaintiff must prove (1) the defamatory character of the communication, (2) its publication by the defendant, (3) its application to the plaintiff, (4) an understanding of the defamatory meaning by the listener/reader, and (5) an understanding of by the reader/listener of an intent by the defendant that the statement refer to the plaintiff. 42 Pa. C.S.A. § 8343(a).[5] A defamatory statement is one that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Birl v. Philadelphia Elec. Co.*, 167 A.2d 472, 475 (Pa. 1960); *see also* Restatement (Second) of Torts, § 566. It is the function of the Court, in the first instance, to determine if the statement in question is capable of

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[5] All parties agree that Pennsylvania law should apply.

defamatory meaning. *Mathias v. Carpenter*, 587 A.2d 1, 2 (Pa. Super. 1991); *U.S. Healthcare*, 898 F.2d at 923.

FSC claims for defamation arise from certain communication, both written and verbal, that American Blind, Delta, Silver, and Yankee had with their clients. Plaintiffs Memorandum, pages 5-11; Plaintiffs Ex. C, Chevallier Tr. 102-103, Dep. Ex. 21; Plaintiffs Ex. D, Martin Dep. Ex. 2 at 4-5, Ex. 3 at 5; Plaintiffs Ex. C, Chevallier Dep. Ex. 22; Plaintiffs Ex. D, Martin Dep. Ex. 6 at 2. Plaintiffs do not dispute the existence of these communications. Rather, they argue that the communication by the four retailers are expressions of opinion and therefore not actionable. Additionally, Plaintiffs argue that the publication of the communications by American Blind and Yankee relied on by FSC was made to Ann Martin, an FSC employee calling at FSC's behest. American Blind and Yankee therefore argue that there was no publication as a matter of law.

In a defamation action involving a private plaintiff and a private issue the Court must look to Pennsylvania state law standards to determine whether the statements are actionable. *Roffman v. Trump*, 754 F. Supp. 411, 418 (E.D. Pa. 1990). An opinion may be a defamatory statement, but only if the statement of opinion implies an allegation of undisclosed defamatory fact as the basis for the opinion. *Id.* Statements of opinion without more are not actionable. *Mathias v. Carpenter*, 587 A.2d at 3. It is for the Court to determine whether a statement is one of opinion or fact. *Id.*

The Court will turn first to the statements of Silver and Delta. After examining the statement by Silver, the Court concludes that it is not an actionable statement. Plaintiffs Ex. D, Martin Dep. Ex. 6 at 2. The central issue revolves around Silver's statement that "F. Schumacher & Co. has decided, through a new marketing policy, to LIMIT YOUR CHOICES as to where you may purchase their wallpaper patterns." *Id.* Plaintiff Silver has presented testimony by an FSC executive that FSC's sales policies did have the practical effect of limiting the choice of someone from outside Silver's local trading area. Plaintiffs Ex. C, Chevallier Tr. at 108-109. Also, Silver's statement does not directly say that FSC's intent was to harm the consumer.

The Court agrees with Silver; seen either as a true statement of fact made in a hyperbolic way, or as an opinion that does not imply the existence of other defamatory facts, Silver's statement is not actionable. The Court similarly concludes that the statement by Delta is not actionable defamation. Plaintiffs Ex. C, Chevallier Tr. Ex. 22. Delta's statement is an opinion and the facts are disclosed. The first paragraph of Delta's statement, standing alone, might constitute an actionable statement, however, the facts from which the opinion is drawn are set forth in the following paragraphs. Id. at 1. Both Silver and Delta are entitled to summary judgment on defamation claims against them found in Counts V and VI.

In moving for summary judgment on the defamation counts against Yankee and American Blind, Plaintiffs argue that these parties' statements were non-actionable opinions and that there was no publication. Plaintiffs publication argument rests on the theory that the statements, even if they were defamatory, were made to Ann Martin, a FSC employee, when she called Yankee and American Blind at FSC's request. A statement made to a corporate employee or officer is publication that will support a defamation action. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, § 113, at 798 (5th ed. 1984). Plaintiffs correctly argue that a defamatory statement made to the plaintiff's agent may not be actionable if the agent solicited the statement for the purposes of bringing suit for defamation, but in this case FSC has offered evidence that Ann Martin called Yankee and American Blind to check on compliance with FSC's trade policies, not to solicit defamatory statements. FSC Ex. 11, Martin Tr. 26-7. Plaintiffs have offered no evidence to the contrary.[6] Accordingly, if the statements by Yankee and American Blind were defamatory in nature, the fact that they were published to a FSC employee will not entitle them to summary judgment on these counts.

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[6] The secrecy FSC employed is as consistent with checking on compliance as it is with soliciting defamatory statements with which to build a case.

FSC's defamation action against Yankee stems from four statements made to Ann Martin by a Yankee employee on April 11, 1990. Plaintiffs' Memorandum, page 30; Ex. D at 37-8, 53; Plaintiffs Ex. D, Martin Dep. Ex. 2 at 4-5, Ex. 3 at 5. Bearing in mind the standards outlined above, the Court concludes that Yankee's statement that "Schumacher won't sell their paper any more through 800-number discounts" (Plaintiffs Ex. D, Martin Dep. Ex. 2 at 4-5), while false, is not so likely to lower the listener's opinion of FSC as to be defamatory. As for Yankee's statement that "Schumacher is being really nasty" (*Id.* at 38), the Court concludes that this is an expression of pure opinion that does not imply the existence of undisclosed defamatory facts. The Court concludes, however, that Yankee's statements "they want people to pay the full retail price instead of paying what the 1-800 numbers charge" (*Id.*) are statements of opinion that imply the existence of undisclosed defamatory facts. Any manufacturer, whether they deal directly with consumers or not, needs to have a positive image in the marketplace to stay competitive. These two statement tend to tarnish that image in a way that could be seen as defamatory. Accordingly, the Court will not grant summary judgment on County VII as it relates to the two immediately preceding statements.[7]

FSC bases its defamation claim against American Blind on the statement "Schumacher will not allow [American Blind] to sell to you because of [its] discount policy." Plaintiffs Ex. C, Chevallier Tr. 102-103, Dep. Ex. 21. Plaintiffs argue that this statement is not defamatory. In the alternative, Plaintiffs argue that if it is defamatory, then it is an opinion and that it was not published. As has been discussed above, the fact that the statement was made to

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[7] Plaintiff Yankee also points to a communication identified as Exhibit H to Plaintiffs' Memorandum in Support of Partial Summary Judgment on the Counterclaims. Plaintiffs argue that this statement's connection to Yankee is too tenuous to support a claim for defamation. In its response, FSC does not contest this assertion. Accordingly, the Court concludes that Exhibit H will no longer be considered as part of the basis for the defamation claim against Yankee.

Ann Martin is enough to satisfy the publication requirement. Just as with the two statements made by Yankee, the Court concludes that this statement is defamatory because it would tend to lower the consumer's image of FSC. The Court agrees with Plaintiffs that this statement is an opinion, but it is one that implied a knowledge of the reasons behind FSC's actions. Therefore, it is a statement of opinion which implies the existence of undisclosed defamatory facts. The Court will not grant American Blind's motion for summary judgment on Count IV.[8]

D. Injurious-Falsehood and Disparagement - Counts IX, X, and XI

Counts IX, X, and XI state a claim for commercial disparagement. The Pennsylvania law of commercial disparagement is set forth above in Part III(D) above and will not be repeated here. These claims arise from the same statements by Delta, Silver, and Yankee that were the subject of FSC's claims for tortious interference and defamation. Plaintiffs Ex. D, Martin Dep. Ex. 2 at 4-5, Ex. 3 at 5; Plaintiffs Ex. C., Chevallier Dep. Ex. 22; Plaintiffs Ex. D, Martin Dep. Ex. 6 at 2. Plaintiffs argue that FSC has failed to make out a claim for commercial disparagrement because their comments were directed at FSC, not its products. In support of this position, Plaintiffs offer the testimony of a FSC official that acknowledges that Plaintiffs did not directly mention FSC's products. Plaintiffs Ex. C, Chevallier Tr. 62-65. It is interesting to note that Mr. Chevallier testified that any attack on FSC is also an attack on FSC's products. *Id.* The

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[8] The parties also make reference to an internal memorandum which instructed Amercian Blind representatives to say "Unfortunately, you are outside our trading area. Schumacher will not allow us to sell to you because of our discount policy." Chevallier Deposition, Exhibit 21. Plaintiffs correctly argue that an internal memorandum does not satisfy the publication requirement. FSC's argument that Ann Martin heard an American Blind representative make a substantially similar statement about another manufacturer is unpersuasive. First, the statement was made about another manufacturer, not FSC, and its connection to statements about FSC is tenuous at best.

Court rejected this argument when made by Plaintiffs in support of their commercial disparagement claims. The Court rejects this argument now when made by FSC for the same reasons it rejected the argument when made by Plaintiffs.

Additionally, FSC argues that Plaintiffs' statements were disparaging because they compared FSC products to those of other manufacturers. In making this argument, FSC points to a statement by Delta that "[t]here are other manufacturers who supply wallcovering products of equal quality to F. Schumacher & Co." FSC Ex. 8, Fei Dep. Ex. 19; Plaintiffs Ex. C, Chevallier Dep. Ex. 22. The Third Circuit addressed the issue of when product comparisons can be the basis for defamation actions in *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914 (3d Cir. 1990). The plaintiff in *U.S. Healthcare*, an HMO, argued that the advertising slogan "Better than HMO. So good, it's Blue Cross Blue Shield" constituted an actionable statement. The Third Circuit rejected this argument saying, "[t]his strikes us as the most innocuous kind of 'puffing,' common to advertising and presenting no danger of misleading the consuming public." *Id.* at 926. If a statement that one party's products are *better* than another's is "innocuous puffing," then a statement that one party's products *are as good as* another's can hardly be defamatory. The Court concludes that Plaintiffs are entitled to summary judgment on counterclaim Counts IX, X, XI.

(VI)

In Count XII of its answer and counterclaim, FSC makes a claim against plaintiff Delta for the price of goods FSC sold to Delta. In counterclaim Count XIII FSC makes a claim for the balance of the account Delta owes FSC. As of July 23, 1991, the outstanding balance Delta owes FSC was $212,455.69. *See* Appendix of Materials cited in FSC's Motion for Summary Judgment on Certain of Its Counterclaims, Haas Affidavit, para. 10 and Exhibit A. FSC moves the Court to enter summary judgment in its favor on counterclaim Counts XII and XIII.

Delta is currently under the supervision of a trustee appointed by the United States Bankruptcy Court for the District of New Jersey. Delta does not dispute that it owes FSC $212,455.69 and does not oppose the motion for summary judgment. Plaintiffs' Response to Schumacher's Motion for Entry of Partial Judgment, page 2. Accordingly, the Court will grant FSC's motion for summary judgment on counterclaim counts XII and XIII.

After filing its motion for summary judgment, FSC moved the Court to direct the Clerk to enter final judgment in the amount of $232,993.08 pursuant to Fed. R. Civ. P. 54(b). This amount represents the $212,455.69 principal plus interest through August 31, 1991. Plaintiffs' have filed a response in opposition to the entry of final judgment. First, Plaintiffs argue that entering a final judgment would give FSC an unfair priority over Delta's other creditors in bankruptcy. Second, Plaintiffs argue that charging interest after Delta filed its bankruptcy petition would violate sections 502 and 506 of the Bankruptcy Code. Third, Plaintiffs argue that FSC has not advance any reason why the Court should enter judgment at this time. In response to Plaintiffs' objections, FSC has filed a second motion seeking entry of partial final judgment. In this motion, FSC withdraws its claim for post-bankruptcy interest. FSC now claims $12,009.64 in interest.

FSC makes its claim for the principal amount under the New Jersey Uniform Commercial Code. N.J. Stat. Ann §§ 12A:1-101 *et seq.* FSC argues that it is entitled to recover prejudgment interest pursuant to Section 2-709 as incidental damages. The New Jersey courts apparently have not ruled on the issue of whether "incidental damages," as the term is used in 2-709, includes prejudgment post-bankruptcy interest, but other states' sections 2-209 have been interpreted to include this type of interest. *See e.g., Bulk Oil (U.S.A.), Inc. v. Sun Oil Trading Co.*, 697 F.2d 481, 486 (2d Cir. 1983); *Edward Klein Truck & Heavy Equip. Co. v. Pitman Mfg. Co.*, 512 F. Supp. 101, 107 (W.D. Pa. 1981); *Delaware Valley Equip. Co. v. Granahan*, 409 F. Supp. 1011, 1015 (E.D. Pa. 1976). Additionally, New Jersey courts historically have awarded prejudgment interest on liquidated damages. *Swatek v. North Star Graphics, Inc.*, 587 A.2d 629, 632 (N.J. Super. 1991) (citing *Meier v. New Jersey Life Ins. Co.*, 101 N.J. 597, 622 (1986)).

FSC states that "[u]nder New Jersey law, interest is calculated based on the average rate of return on the State of New Jersey Cash Management Fund as reported by the Division of Investment in the Department of Treasury. *See 1992 Rules Governing the Courts of the State of New Jersey*, Part IV, R.:42-11." FSC's Motion for Entry of Partial Judgment on Counts XII and XIII, page 2. According to FSC, the interest rate for 1990 was 8.0 percent and the interest rate for 1991 was 8.5 percent. FSC calculates that Delta owes in $12,009.64 in interest for the period between July 1, 1990 and March 30, 1991. Delta has not challenged FSC's pre-bankruptcy interest rate calculations. These calculations appear to be reasonable and the Court will accept them.

FSC has not presented the Court with a compelling reason why the Court should enter judgment on these two counts and certify them according to pursuant to Rule 54(b). Given the general policy of avoiding piecemeal litigation, the Court shall refrain from entering judgment on these two counts at this time.

(VII)

For the foregoing reasons, the Court will enter partial summary judgment in favor of defendants FSC and NDPA on all claims found in the Amended Complaint, except Count V. The Court will grant partial summary in favor of plaintiffs (counterclaim defendants) American Blind, Delta, Silver, and Yankee on counterclaim Counts I, II, III, V, VI, VIII, IX, X, and XI. The Court will deny American Blind and Yankee's motion for partial summary judgment on counterclaim Counts IV and VII. Finally, the Court will grant partial summary judgment in favor of FSC on counterclaim Count XII and counterclaim Count XIII, except that FSC is not entitled to collect post-bankruptcy interest. The Court will deny FSC's motion for entry of partial final judgment.

An appropriate order follows.

/S/
Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALVORD-POLK, INC., et al.,	:	
	:	
Plaintiffs	:	CIVIL ACTION
	:	
v.	:	NO. 90-3617
	:	
F. SCHUMACHER & CO. and THE NATIONAL DECORATING PRODUCTS ASSOCIATION, INC.,	:	
	:	
Defendants	:	

ORDER

HUYETT, J. March 13, 1992

For the reasons stated in the foregoing memorandum of law, defendant F. Schumacher & Co.'s ("FSC") motion for partial summary judgment on the antitrust conspiracy claims, Counts II, III, IV, and VI, is GRANTED. Defendant The National Decorating Products Association, Inc.'s ("NDPA") motion for partial summary judgment on Counts I and II of the Amended Complaint is GRANTED. FSC's motion for partial summary judgment on the state law claims, Counts, VII, VIII, IX, XI, and XII, is GRANTED. NDPA's motion for partial summary judgment on the state law claims, Counts VI, VII and X of the Amended Complaint, is GRANTED.

Plaintiffs American Blind Factory, Inc. ("American Blind"), Delta Paint and Wallpaper Supply, Inc. ("Delta"), Silver Wallpaper & Paint Co., Inc. ("Silver"), and Yankee

Wallcoverings Inc.'s ("Yankee") motion for partial summary judgment on counterclaim Counts I through XI is GRANTED IN PART and DENIED IN PART. Partial summary judgment is GRANTED in favor of plaintiffs American Blind, Delta, Silver, and Yankee on counterclaim Counts I, II, III, V, VI, VIII, IX, X, and XI. Partial summary judgment is DENIED as to counterclaim Counts IV and VII. Partial summary judgment on FSC's First Affirmative Defense and NDPA's Third Affirmative Defense is DENIED.

Defendant FSC's motion for partial summary judgment on counterclaim Counts XII and XIII is GRANTED IN PART and DENIED IN PART. Partial summary judgment is granted as to the principal amount plus prejudgment pre-bankruptcy interest Delta owes FSC, but summary judgment is denied to the extent FSC makes a claim for post-bankruptcy interest. FSC's motion for entry of partial final judgment on counterclaim counts XII and XIII is DENIED. FSC's motion for leave to substitute modified form of proposed order for entry of partial final judgment is DENIED.

Accordingly, Counts I, II, III, IV, VI, VII, VIII, IX, X, XI, XII of the Amended Complaint are DISMISSED. Counterclaim Counts I, II, III, V, VI, VIII, IX, X, and XI found in FSC's Answer are DISMISSED.

IT IS SO ORDERED.

/S/
Daniel H. Huyett, 3rd, Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1762

ALVORD-POLK, INC.; AMERICAN BLIND FACTORY, INC., et al.,

Appellants,

v.

F. SCHUMACHER & CO.; THE NATIONAL DECORATING PRODUCTS ASSOCIATION, INC.

Appellees,

SUR PETITION FOR REHEARING

Present: Sloviter, Chief Judge, Becker, Stapleton, Mansmann, Greenberg, Hutchinson, Scirica, Cowen, Nygaard, Alito, Roth, Lewis and McKee, Circuit Judges

The petition for rehearing filed by Appellee, F. Schumacher & Co., in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/S/ Lewis
Circuit Judge

Date: November 15, 1994